NORTHERN PIPELINE BANKRUPTCY DECISION

HEARINGS

BEFORE THE

COMMITTEE ON
THE JUDICIARY
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

BANKRUPTCY REFORM ACT OF 1978

JULY 22 AND 23, 1982

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NORTHERN PIPELINE BANKRUPTCY DECISION

THURSDAY, JULY 22, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to call, at 2:05 p.m., in room 2228, of the Dirksen Senate Office Building, Hon. Howell Heflin (acting chairman) presiding.

Present: Senator Thurmond.

Staff present: Vinton DeVane Lide, chief counsel, Eric Hultman, general counsel, Sally Rogers, counsel, and Ann Morgan, clerk, Committee on the Judiciary, Richard W. Velde, majority chief counsel, Arthur Briskman, minority chief counsel, Doug Comer, counsel, and Pat Brown, chief clerk, Subcommittee on Courts.

OPENING STATEMENT OF SENATOR HEFLIN

Senator HEFLIN. The committee will come to order. Congress is faced with a situation of potentially enormous ramifications which we must address and take some hard decisions on in a relatively short period of time. I commend Chairman Strom Thurmond and Senator Bob Dole, the chairman of the Subcommittee on Courts, for their continued effort for the improvement of the administration of justice in our Federal judiciary and for recognizing the need to review this matter and act expeditiously by calling these hearings at this time.

Senator Dole is the floor manager on the floor of the Senate right now at this time for the tax package reconciliation bill and is unable to chair this hearing. And I am delighted to try to substitute for him.

The Bankruptcy Reform Act of 1978, which was enacted prior to my coming to the Senate, and the product of almost a decade of effort by the Congress to overhaul a bankruptcy system badly in need of reform, has been challenged by the Supreme Court of the United States as unconstitutional. This ruling, issued on the 28th of June of this year in the case of *Northern Pipeline Construction Company* v. *Marathon Pipeline Company,* has been stayed until October 4, 1982. The Court has given this Congress time to reevaluate the existing law and organization of the bankruptcy court. The time is short and the issues are complex.

We are here to discuss the impact and the ramifications of the Court's ruling on the operation of the present bankruptcy court system. More importantly, we are here, over these next 2 days, to discuss what exactly this Congress can do by October 4 and beyond to insure that we maintain a smoothly functioning constitutional bankruptcy court system.

I believe as we examine the options available to us that we should bear in mind the intent and purpose of the Bankruptcy Reform Act of 1978. That act was the culmination of years of joint effort between the House and the Senate, members of the Federal judiciary and the bankruptcy bench and bar to put into place a streamlined bankruptcy court system. The bankruptcy court system involves a broad spectrum of our citizens in their businesses struggling in tough economic times.

The 1978 Reform Act sought to reduce the delay, fragmentation of jurisdiction and undue expense that often confronted those seeking the protection of our bankruptcy laws. I do not read the Court's ruling in the *Marathon* case to repeal the basic effort in 1978. However, we must proceed to solve any legitimate constitutional problems with the 1978 act.

I want to extend appreciation to those who have given up of their valuable time to appear at these hearings. We welcome your expertise, comments and recommendations on this complex problem, confident that with the help of your guidance and counsel this Congress will be successful in finding the proper solution.

I have for the record a statement of Senator Robert Dole which will be entered into the record in full.

[The following was received for the record:]

PREPARED STATEMENT OF SENATOR ROBERT DOLE

In 1978, as the 95th Congress moved toward final passage of what is now known as the Bankruptcy Reform Act, perhaps the most important compromise struck between the House and Senate was that dealing with the scope and organization of the judicial powers to be vested in the new bankruptcy courts created by the act. The focus of disagreement was on whether or not the bankruptcy judges, who were granted the authority to render final judgment in any dispute related to a bankruptcy proceeding, would exercise those powers as courts constituted under article III of the Constitution, with lifetime tenure and protection from diminution of salary; or, whether they would exercise those powers as article I courts, with fixed terms of appointment and decisions subject to de novo review in the United States district courts. The House took the position that full judicial independence was required in order to guarantee the constitutionality of the new courts, which would exercise greatly expanded jurisdiction; while the Senate, in essence, sought to place ultimate jurisdictional and supervisory authority in the hands of the article III district courts, making the bankruptcy courts true adjuncts of the district courts.

The solution adopted in 1978 was a hybrid one: While original and exclusive jurisdiction over all bankruptcy cases was retained in the article III district courts, the new law mandated that only the article I bankruptcy courts could exercise that jurisdiction—with the district courts relegated to the status of appellate courts reviewing bankruptcy decisions for clear error of law.

That flawed compromise has now returned to haunt the Congress. On June 28th of this year, the Supreme Court of the United States, in the case of *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, invalidated the jurisdictional structure of the 1978 Bankruptcy Reform Act. In a plurality opinion, the court concluded that the expanded reach of the bankruptcy courts—the exercise of jurisdiction over all civil disputes related to a bankruptcy proceeding as well as the simple administration of debtors' estates—resulted in those courts considering matters which had been historically reserved for the province of article III courts. Yet the bankruptcy courts did not benefit from the lifetime tenure and protection from salary diminution required by article III of the Constitution—thereby denying litigants their constitutional right to have their cases heard by judges removed from the pressures of the political process.

Thus, the committee convenes today and tomorrow to receive testimony which, we hope, will point the way to a sound resolution of the jurisdictional problem Congress created by the compromise adopted in 1978. We seek a bankruptcy system that is constitutionally structured, fair to litigants, and at the same time, reflective of congressional consensus as to the proper place of bankruptcy courts in the scheme of Federal judicial powers. We look forward to hearing the views of judges, academics, practitioners and individuals representing various groups who are intimately experienced with the workings of the bankruptcy system. To all of these witnesses, I extend a welcome; and I would further like to express my appreciation for their willingness to prepare and present testimony on such short notice. As all of them are aware, the Supreme Court has stayed the judgment in the *Marathon* case until October 4th in order to give Congress an opportunity to rectify the problems with the Bankruptcy Code. That puts us under some pressure to move at a faster pace than we are accustomed to travelling.

Senator HEFLIN. We have as our panel today Judge Dean Gandy, president of the National Conference of Bankruptcy Judges, and Judge David Kline, the U.S. bankruptcy judge of the western district of Oklahoma, Oklahoma City. Judge Gandy is from Dallas, Tex. Accompanying the panel is Judge Lloyd George, of Nevada; Judge Harold Mai, of Wyoming; and Judge Ralph Mabey, of Utah.

We are delighted to have you gentlemen with us, and we will go ahead and proceed.

STATEMENTS OF JUDGE DEAN GANDY, PRESIDENT, NATIONAL CONFERENCE OF BANKRUPTCY JUDGES, DALLAS, TEX.; JUDGE DAVID KLINE, U.S. BANKRUPTCY JUDGE, WESTERN DISTRICT, OKLAHOMA CITY, OKLA., ACCOMPANIED BY JUDGE LLOYD GEORGE, NEVADA, AND JUDGE RALPH MABEY, UTAH

Judge GANDY. Thank you, Mr. Chairman, I am Dean Gandy, president of the National Conference, and it is a pleasure for us to be here and try to help Congress work out this problem to the extent that we can help.

On my left is Judge Kline, of Oklahoma; to his left is Judge Lloyd George, of Nevada, and to his left is Judge Ralph Mabey, of Utah. Judge Mai, of Wyoming, could not be here.

I have filed a written statement, and I do not propose to read that statement, but only supplement it with matters that I think can best be covered with oral testimony. It is our conclusion that certainly the plurality and concurring opinions find section 241(a) of the code unconstitutional. There will probably be 220 separate opinions as to what to do between now and October 4, but we all seem unanimous in saying after October 4 everything comes to a screeching halt if nothing has been done.

I would like to emphasize the problem that will exist if nothing is done. I conducted a survey of the matters that I had set on my docket in May and June of this year. I applied the test that I think Justice Brennan attempts to apply in his plurality opinion, namely, the test that bankruptcy judges do not have the constitutional authority to decide private rights that arise under State law. And I concluded, of those matters that were set on my docket for the last 2 months, 86 percent I would have questionable constitutional authority to decide.

So this is not a narrow range of matters; it is a very broad range.

Now, in response to your question, in regards to possible legislative measures other than article III status for bankruptcy judges, we take the unequivocal position that there really is no satisfactory alternative to article III status. I do list two other possible solutions which we consider unsatisfactory, but which you may wish to consider. And the first one is the creation of a large number of additional district judges to handle bankruptcy matters.

I say in my statement that this would be an inefficient way to do it. Bankruptcy has not, at least until recent times, been very glamorous; it has always been the unattractive side of the Federal judiciary, and the district judges who had the power to handle civil rights matters and criminal matters, I am fearful, might relegate the less glamorous bankruptcy issues to a lower order of priority.

Additionally, I would point out that the creation of additional district judges would be far more expensive than the bankruptcy judge article III alternative.

What is contemplated, what we hope would happen, would be that bankruptcy judges, not necessarily those presently in office—we will talk about that later—but bankruptcy judges would be constituted article III judges. They would have, oh, substantially the same salary as bankruptcy judges today; they would have the same law clerks, they would have the same courtroom, there would be no additional cost, no added expense because of that situation.

It is true that bankruptcy courts now are handling three times the amount of business that they handled before the code with the same number of judges, so there may be, at some subsequent time, a need for additional bankruptcy judges, but that would have nothing to do with the article III status.

But the rest of the matters I wish to cover are set forth in my statement, except for one thing, and that is the description that I referred to of the horrors of plenary and summary jurisdiction. And, as a bankruptcy judge with about 50 percent business cases, I think it is extremely important for everyone to understand the absurdity and the enormous waste of money that plenary and summary jurisdiction created. Plenary and summary jurisdiction, of course, arose probably prior to the 1898 act out of the need to handle property in a bankrupt's possession quickly. If property was not handled quickly, the bankrupt, who had lost all concern with that property, would not protect it, thieves would steal it, creditors would take it to pay off their debts, vandals would vandalize it. So there had to be a quick way that disputes regarding property in the possession of the debtor at the time of the filing of the petition were decided. So slowly that evolved prior to 1898 and after 1898. And if the property was in the possession of the debtor, the bankruptcy court exercised summary jurisdiction; and if it was not in the possession of the debtor, the district court exercised plenary jurisdiction.

But then when a thief was discovered in the possession of the property, the court said, well, he is not really entitled to possession, so we will overlook that situation and say that if this person has colorable possession, that in reality constructive possession remains in the debtor and the bankruptcy court should decide it.

That worked fairly well in the early days of bankruptcy, but then what do you do with a chose in action or a letter of credit or the like? Who is in possession of that? The rule didn't work.

So slowly the focus changed from possession to whether a substantial adverse claim was being asserted against the property. And for years bankruptcy courts spent time trying to decide whether there was a "substantial" as distinguished from an insubstantial adverse claim. And millions of dollars were wasted in arguments over where shall this case be tried, not who will win it.

I once tried an alter-ego case for 3 weeks to try to determine whether there was a substantial adverse claim. The appellate courts said decide the question on the basis of pleading. Well, you looked at the plaintiff's pleading, and it was perfect: he said facts A, B, C, and we should win. The defendant said: no, facts A, B, C are different, we should win. You had to try it, and millions of dollars were wasted. And that is why one of the principal contributions of the code was to eliminate the uncertainty regarding plenary and summary jurisdiction, and to create one court to try it all.

Now, *Marathon Pipeline* holds that court must be an article III court. And I would hope that everyone can join together to achieve that objective. If it means that existing bankruptcy judges lose their jobs, so be it—that objective must be accomplished. I would hope that it would be realized that many of these men who have devoted their middle years to this position should be compensated in some way with a fair and equitable retirement system which does not now exist. But if that be lost, so be it. There has got to be an article III solution to this problem, and we strongly support it.

Judge **Kline**. I'm David Kline——

Senator **Heflin**. We have a vote on right now and we are going to have to adjourn shortly, but go ahead, the 7-minute warning hasn't gone on.

Judge **Kline**. That will be more than enough, thank you, Mr. Chairman.

It is a real pleasure to be here. I want to offer for the record a written statement which doubtless will be considerably more orderly than my few oral remarks. I would like also to offer two alternate suggested bills with an explanation, supposedly, of each one which may or may not prove helpful, but at least it will be something to look at and consider.

Simply stated, we are here to consider whether or not this committee will sanction the literal dismantling of the only financial judicial forum in the country, right while the whole system, as you have mentioned, Mr. Chairman, is literally struggling to right itself. I am not insensitive to Chairman Dole's request and invitation for alternatives other than the article III approach. But regretfully I am persuaded at this point that there is no other such approach, and I say regretfully because this is the first time that I have gone on record in favor of an article III approach.

As I recall, in 1977 when I appeared before both subcommittees, I was the only one on the particular panels urging article I rather than article III.

Now, all may still argue just for awhile Marathon's stance, but there is no argument about the fact that we had four opinions and nine Justices. And no one can come before you and fairly and safely advise this committee of any course of legislative action which will not spawn endless litigation—I don't care how carefully it's drawn or how persuasively it's presented; that is a fact, I believe, that is practically irrefutable. And all concede that an article III judgeship will end all possible controversy, under any of the opinions, regardless how you construe them.

Senator DeConcini will recall that through this 8 years of legislative inquiry there were many, many differences; they continued right to the end, they were worked out at the end—and many continue up to this time. But the one thing that all knowledgeable, informed persons, agreed on was the fact that you needed to have one court to decide these matters with sufficient jurisdiction to do it. And that is where this now centers.

Senator HEFLIN. There is our warning. We are going to have to recess, and we will try to come right back.

[Brief recess.]

[The chairman assumes the chair.]

The CHAIRMAN. The committee will come to order. Today we begin hearings on the Supreme Court's decision in *Northern Pipeline Construction Company* v. *Marathon Pipeline Company.* As all here are aware, the Supreme Court in that decision held unconstitutional the law granting jurisdiction to the bankruptcy judges in the 1978 Bankruptcy Reform Act. The Court, however, stayed the effective date of this decision until October 4 in order to allow Congress time to respond to the *Marathon* decision and to cure the jurisdictional defects of the 1978 Act.

The October 4 deadline is a tight one, and both Houses of Congress will have to act as quickly as possible in order to have corrective legislation in place by that time. I assure you that this committee will make every effort to do so.

There are several options open to us to resolve the jurisdictional defects pointed out in the *Marathon* decision. The options include a return to some form of the pre-1978 system of bankruptcy referees, granting bankruptcy judges article III status, or giving these judges article 1 status by narrowing their jurisdiction to conform to Marathon.

While I realize that a number of the witnesses testifying today probably favor article III status for the bankruptcy judges, I hope that each witness will address the advantages and disadvantages of other approaches as well, particularly in light of the fact that we may have to fashion some sort of interim solution in order to meet the October 4 date set by the Court. I would have to say, however, that I have serious reservations about giving article III status to bankruptcy judges. I am concerned about the inflexibility and cost of granting life tenure to over 200 specialized judges whose work load has historically been subject to fluctuation.

At any rate, article III status may not be a practicable solution in light of the need to take action before October 4.

I would like to thank all of our distinguished witnesses for their testimony today. I am sure that their experience and insights will be of great assistance to the committee. And we are very pleased to have you with us, and we thank you for your appearance here today.

Judge Kline, I believe you were presenting your statement.

Judge KLINE. Yes, thank you very much, Mr. Chairman. It is a privilege to be before you.

I had just remarked that Senator Dole in his invitations emphasized alternate routes other than the article III approach, and I might emphasize that in the subcommittee hearings in 1977 I was, as I recall, the only person there holding out for article I as opposed to article III.

I am satisfied at this point that under all the circumstances some form of article III approach is necessary to keep the court intact, if that is to be the end result. And we are talking about whether or not we are going to dismantle what amounts right now to the only functioning financial judicial forum in this country.

Now, there is some dispute about what *Marathon* stands for, but I think all agree that no one could advise you on any course dependably that will not spawn endless litigation, so we are talking about a practical thing right now. Are we going to have a court that can deal with this economy at this time? Everyone is aware of the hundreds of thousands of cases and the ones involving the consumer, but the critical point now to me, by way of emphasis, is the fact that business itself is struggling to survive. We have right now some 85,000 business cases, and you are talking about whether or not you are going to provide a forum that gives them a chance to survive or whether you are going to let them absolutely go down the chute without a struggle. People think of bankruptcy as intensive care—and it is. But it beats going directly to the burial place, and that is what we are talking about in a real way, and I regret that everyone is not exposed on a day-to-day basis to just what we are talking about. I come from Oklahoma where the economy generally has been spared; we have been as low as 3½ percent unemployed; it is now up to 4½, which is a haven compared to the rest of this country. We are having oil operators, developers, they are starting to come literally out of the woodwork in terms of needing some help—and this help helps the bank to see that the security interests are protected; you must have a place to go into where one voice has some authority to do something. Even an imperfect answer that is done expeditiously is twice as forceful as some theoretical approach that a year and a half later tells you you were right, when it makes very little difference. And that, to me, is the urgency to in some way sustain this forum and give it a chance to fight. This is a remarkable tool—and I wish I could go into the examples of just how it can be used—but it is working. It is not perfect, and certainly it isn't being administered perfectly, certainly not in the western district of Oklahoma. But we can do things.

And with all due respect to the whole judicial approach in this world, I can assure you that in practical ways, with persons coming through the door, whether it's the Bank of America or someone who is in an impossible bind, we can get something done.

And I urge that whatever it takes to leave this forum able to deal with these problems will be absolutely a thing that will prove to the benefit of all concerned across the board.

Now, to close, on the matter of expense. I wouldn't for a moment seriously suggest an article III across-the-board U.S. district judgeship approach. I come from Oklahoma, and I might very fairly say that I come from a climate, like South Carolina and Kansas and all the rest, where there is no enthusiasm for needless additional article III district judges. But we can identify this judgeship in a way so as to be competent to do this job, and then do what you want to about setting a salary—restricting the assignment duties, et cetera.

Now, Mr. Chairman, I really think that it is critical that as to assignment that this position not be interchangeable with the U.S. district judge; don't permit bankruptcy judges to go into criminal matters, don't permit them to go into social issues, put the salary wherever you want to. But identify this position as article III, give it life tenure, and then do whatever you want by way of restriction; make it temporary to expire upon the death of the individual judge, to where the Congress then has an opportunity to come along and second-guess so this expense is not built in. There is a way to deal with this and code court make it constitutional and not have a financial consideration here that is overpowering in this day.

Thank you.

The **Chairman**. Judge Kline, why did you take the position of supporting article I judges instead of article III?

Judge **Kline**. Because I knew there wasn't a chance in the world of getting this bankruptcy reform through, in my judgment, if tied to article III judgeships. Now we have had the code in operation for 2½ years, and it is proving to be, on balance, a wonderful thing. The issue is now directly checked to everyone involved: will you have a court of stature like this or not? In my judgment, you never would have had the test.

The **Chairman**. All right, now, I will be glad to hear from the rest of you.

Judge **George**. Mr. Chairman, I am Lloyd George from the district of Nevada. I won't take long, hopefully; I would simply like to emphasize a couple of points. I agree with Judge Kline and Judge Gandy. I believe that the *Marathon* case has clearly limited Congress to one of two possible options: it must either restrict the broad jurisdictional grant—a task I really think, Mr. Chairman, to be of terrifying proportions, if Congress is to do it effectively and to accomplish what was intended by the act to begin with—or change the constitutional status of the bankruptcy court.

To accomplish what was really intended, I am satisfied that the latter method is the only way it could be accomplished.

If I could take just a moment to try and give the committee my observations with regard to the *Marathon* case, specifically. The *Marathon* case and the dissent—the dissent, perhaps, is what some of us wish the majority opinion had been. But it isn't, so we must face the decision as it now stands.

The reasoning of the dissent, however, invit[illegible] observation that I call the difference between "suing in" [illegible]uing out". As Justice White indicated, there has been n[illegible] with "suing in"; that is to say, when a creditor has [illegible]aim, that creditor's claim can be heard. It may, Senator Thurmond, be precisely the same kind of claim that was being litigated in the *Marathon* case—it may involve a contract, a tort, or whatever. There was no prohibition as long as it was "suing in"; that is, if the creditor were asking the court to make a determination. The difference is the "suing out" question. When the debtor seeks to sue a creditor and to bring assets into the estate, somehow that difference is prohibited by the *Marathon* majority. We can't do anything about that. The majority of the Supreme Court has so ruled.

I was asked just yesterday how many *Marathon*-type cases I have, and I wish I had precise figures. Judge Gandy has indicated that about 80 percent of his cases are in that category. I think not so many of mine are of this type. But in the southern part of the district of Nevada, I would estimate that I have at least 50 to 100 such cases. Some of them, Senator Thurmond, involve monetary amounts in excess of a million dollars, and being able to bring those actions and to bring those assets into the estate is extremely important to the administration of the estate. Someone has wisely observed that it is not just a matter of how many actions are brought, but, additionally, it is extremely important that the court having the authority to entertain those actions be in a position to discourage a lot of conflicts that may otherwise exist; in other words, attorneys—and I was an attorney for a good long while—are tacticians; if they know that an action is going to have to be filed in a State court, anyway, and that it may take 3 or 4 years to litigate that question, they will file in State court, if on to give them bargaining time. They will not do so if they are satisfied that it can be heard with dispatch and a determination will be made that discourages the filing of further actions. So the number of cases isn't really indicative of the importance of being able to pursue all of these kinds of claims. In terms of practice, there is very little difference between these types of claims. The only significant difference I see, really, is between the idea of "suing in"—that's OK, if a creditor makes a claim—and "suing out", the same kind of a claim, which is somehow not OK. The Supreme Court has drawn that distinction.

Now, if I may—and this is at the request of Chief Judge Browning, chief judge of the ninth circuit—I would like to address a topic that none of my brethren has discussed, but it holds great importance to me and I think to Judge Browning—I'm certain to Judge Browning. I refer to the bankruptcy appellate panel program. As you know, this is the program whereby ad hoc panels can hear, at the option of the circuit council, appeals, rather than have the district court hear such appeals.

Certain of the bills which have been or will be proposed, in the wake of the *Marathon* decision, contain provisions that would do away with the bankruptcy appellate panel experiment. I am one of 5 bankruptcy judges who sits on the panels in the ninth circuit, where we have about 48 bankruptcy judges, in all. I can only say that our circuit's experience with the panels has been highly successful. A recent survey that has been conducted by the circuit executive of the ninth circuit, involving attorneys, bankruptcy judges, district judges, and circuit court judges—all were questioned as to their feelings about the panels. Among the attorneys who had practiced before the panels, 88 percent favored a retention of the panels and 85 percent felt that the panel concept should be utilized elsewhere in the circuit. The program now, I should say, includes most of the circuit, and recently there has been a recommendation that it be extended to all parts of the circuit and this is a very large circuit—except Hawaii and Alaska.

Almost all of the bankruptcy judges—whose decisions and orders are being appealed to the panels—approved of and encouraged the expansion of the system. The district judges responded with 85 percent being in favor of retention, and 75 percent supporting panel expansion within the circuit.

With respect to the responses of the circuit court judges, 82 percent noted no prior experience with the panels; nevertheless, 47 percent of the circuit judges of the ninth circuit thought the panels should be used in the future; the same percentage felt that the panels should be used in additional districts within the circuit.

As I indicated, Judge James R. Browning, the chief judge of the ninth circuit, has asked me to make this statement with respect to the panels, and has expressed a great interest in the appellate panels and has consistently supported their continuation. I feel, as does Chief Judge Browning, that it would be a grave mistake to overlook the potential of the bankruptcy appellate panels in the handling of bankruptcy appeals. Given this generally favorable feeling toward the panels in the ninth circuit, where the experiment has been used extensively and has lasted over a 2-year period, it would seem unwise to me to reject the program out of hand. Indeed, it might be well to look into the suggestions which have been made to implement this program on a permanent, as opposed to an experimental, basis.

I have, incidentally, Mr. Chairman, a copy of that survey which was conducted by the circuit executive, and, with the leave of the chairman, I would like to lodge this survey with the committee, if I may do so.

The CHAIRMAN. All right, we will place that in the files of the committee.

[The following was received for the record:]

OFFICE OF THE CIRCUIT EXECUTIVE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEMORANDUM

TO : Bankruptcy Appellate Panel Advisory Committee

FROM: William E. Davis, Circuit Executive WEDJr

DATE: July 12, 1982

RE : Materials for July 14, 1982 Meeting

Enclosed please find a summary of the results of the Evaluation Survey and the minutes of the Symposium retreat held June 11-12, 1982.

Highlights of the survey are the recommendations to continue the panel, expand the Bankruptcy Appellate Panel to cover the entire circuit, and increase the number of judges on the panels. Another recommendation that has been discussed with the panel members is relocating the Clerk's Office to San Francisco to better integrate the staff with the Court of Appeals and give them the benefit of the appellate court management expertise.

Assuming there will be a congressional action reauthorizing the existence of the panel, the committee might consider developing a formal charter for the panel to change its status from experimental to permanent.

WED:ym
Enclosure

cc: Bankruptcy Appellate Panel Judges

During the months of May and June, questionnaires were distributed to all attorneys who have appeared before the panels, other bankruptcy judges, and district and circuit court judges. Each questionnaire was designed to obtain information based on the individual's experience and knowledge of the panels.

The results of the questionnaires are very favorable in support of the panels. The majority of those responding agreed the panels should be continued and expanded to other districts in the Circuit. Attorneys and judges both agreed that more BAP judges should be appointed and BAP judgeships should be full-time appellate positions.

The respondents were asked to give their opinions about the BAPS' procedures for handling appeals, and to make recommendations for changes. The most notable criticism of the panel was that BAP decisions should appear sooner; they should be shorter and there should be fewer of them.

On the following pages are short summaries of the responses to each questionnaire. Copies of the questionnaires are attached as appendices.

ATTORNEYS' QUESTIONNAIRE (Appendix A)

Of 300 questionnaires distributed, 107 were returned. Half of the attorneys responding spent more than 50% of their time practicing bankruptcy law. The majority (52%) have filed bankruptcy appeals before the District Court and thus have some experience with both procedures. Only a few have had more than five cases before a BAP, and approximately 40% sought review in the Court of Appeals after a BAP decision. The questionnaire asked the attorneys to evaluate the BAP on the following: (1) the economy and speed with which BAP handled appeals, including an assessment of the mandatory conference procedures; (2) if the attorney had oral argument, how prepared the panel was for argument and whether or not argument was useful; (3) the quality of BAP decisions, and (4) whether or not BAP should be continued and expanded in the Ninth Circuit.

Also, the questionnaire asked the attorneys to note any recommendations they had for improving the panels.

Economy

Attorneys felt that appealing to BAP was more economical for their clients than appealing to the District Courts, 45% said it was, 41% said it was not, and 14% said they were not sure. Those who said the BAP were more economical, noted the greater speed with which BAP handled cases, and the faster and easier briefing process because the judges were more knowledgeable about the issues. One common complaint concerning expenses was that counsel had to drive too far to the hearings.

Case Processing

Forty-eight per cent of the attorneys felt the BAP expedited the appeals process, 35% did not feel the process moved any faster than the District Court; and 17% did not answer or were not sure. The most common comments of those who thought BAP were faster was that the BAP panels were speedy in emergency matters, hearings were timely, briefing was easier and faster, and the use of the telephone to handle motions and other matters helped to expedite case processing.

Mandatory Conferences

Fifty-four per cent of the attorneys like the BAP procedure of having mandatory conferences because they helped narrow and clarify the issues, establish a reasonable briefing schedule, determine the status of the record, and facilitate settlement. Attorneys said the conferences helped "novice" attorneys become acquainted with the case and with BAP procedures. Of those objecting to the system, several noted it occurred too early in the appeal process to be meaningful.

BAP Opinions and Decisions

Seventy-five per cent of the attorneys have greater confidence in the correctness of BAP opinions than in District Court opinions, mainly because the attorneys have confidence in the bankruptcy judges' knowledge and interest in bankruptcy cases. The majority of the attorneys rated BAP opinions as good, 47% of the attorneys felt the panels were accomplishing their stated goal of establishing a uniform body of quality bankruptcy law, 42% did not answer, and 11% thought the panels were not accomplishing this goal.

Oral Argument

Sixty-five per cent felt oral argument was helpful in resolving the issues on appeal, 53% felt the BAPS familiarity with substantive and procedural law was excellent, 20% felt the panels' knowledge was good, and 27% felt it was fair, poor or could not rate the panels.

Recommendations

(1) Eighty-eight per cent (88%) of the attorneys who have practiced before BAP want to see the panels continued; (2) eighty-five per cent (85%) want BAP expanded to other districts; (3) the BAP judgeship must either become full-time positions, or more judges must be appointed; (4) the judges need training in appellate procedure so that they better understand the scope of appellate review; (5) decisions must be issued more quickly; (6) BAP rules must be clarified; (7) BAP should keep mandatory conferences; (8) BAP should accept fewer discretionary appeals, and (9) the BAP should issue more per curiam decisions and fewer full length opinions.

BANKRUPTCY JUDGES QUESTIONNAIRE (Appendix B)

Of 48 questionnaires distributed, 38 were returned. This questionnaire asked the bankruptcy judges to evaluate the panels in the following areas: (1) how the existence of the panels has affected their workload; (2) how the bankruptcy judges rate the quality of the BAP written opinions in comparison with the District Courts, and (3) whether or not the panels should be continued or expanded to other districts in the Circuit.

The questionnaire also asked for recommendations for improving the panels.

Workloads

Thirty-nine per cent of those answering said BAP had no effect on their workloads, 11% said it had increased, and only three judges said it had decreased. The remainder did not respond.

Written Opinions

BAP decisions were generally viewed as being superior to the District Courts, but many are too long. Fifty-eight per cent felt BAP decisions are superior to the District Courts in the application of relevant law to the facts, 56% felt BAP decisions were clearer, 60% felt the panels evinced superior understanding of the complexity of the issues involved, and 57% felt decisions were issued more quickly than District Courts' decisions. Forty-seven per cent of the respondents rated BAP decisions as similar to the District Courts in indicating why arguments contrary to the result were rejected, and 58% felt the BAPS were equal to the District Courts in clearly explaining the action to be taken on remand. Eighty-seven per cent felt the panels were establishing a uniform body of decisional appellate bankruptcy law in the Ninth Circuit.

Recommendations

> (1) Seventy-nine per cent (79%) recommended continuing BAP and 84% recommended expansion of the panels into other districts. The bankruptcy judges indicated the BAP decisions reflect a better understanding of bankruptcy law. They felt expansion would help increase uniformity in bankruptcy law and relieve the District Court workloads. (2) assign judges to BAP full-time or assign more judges on a rotating basis; and (3) provide more law clerks and staff assistance to the panels.

DISTRICT COURT JUDGES QUESTIONNAIRE (Appendix C)

Of 100 questionnaires distributed, 44 were returned. The judges were asked to evaluate the panels in the following areas: (1) how the existence of the panels, if they operate in the district, affected the district judges' workload, and (2) whether or not the BAP should be continued and expanded in the Circuit.

The questionnaire asked for comments on the panels' procedures and any recommendations for improving BAP the district judges wished to offer. As with the other two questionnaires, the district judges were asked to rate the panels concerning whether or not they are establishing a uniform body of decisional Appellate Bankruptcy Law in the Ninth Circuit.

Of those district judges with BAP in their district, 67% felt BAP reduced their workload, 30% were not sure, and the remainder said it had no effect.

Eighty-five per cent (85%) of those district judges with BAP recommended continuing the BAP, 15% did not answer, 75% felt the panels should be expanded into the other districts.

Of those judges without BAP in their districts, 47% recommended continuation of the panels, and only one judge recommended discontinuing them, 47% recommended expansion of the panels, 35% did not answer, and 18% said no.

Concerning the question about establishing a uniform body of decisional appellate bankruptcy law in the Circuit, 60% of those judges with BAP said they did not feel qualified or informed enough to respond, as did 76% of the district judges without BAP in their district.

Recommendations

The district judges want the panels continued and expanded. Many felt the BAP judges have more familiarity with bankruptcy law and are therefore the most efficient means of handling bankruptcy appeals.

CIRCUIT COURT JUDGES' QUESTIONNAIRE (Appendix D)

Of 30 questionnaires distributed, 17 were returned. Eighty-two per cent of the responses received stated no experience with the panels. Nonetheless, 47% felt the BAP should be continued, and 47% recommended expansion of the panels.

Only three judges commented on the quality of the BAP written decisions. One judge felt the written opinions were superior to the district courts' opinions, and two thought they were similar.

Recommendations

(1) The circuit judges recommended the panels expedite decisions, file shorter and fewer dispositions, and reverse less frequently; and (2) the panels should follow Ninth Circuit cases more carefully, and several judges noted that the Ninth Circuit, not the BAP was responsible for estabishing uniform bankruptcy law.

APPENDIX A

I. Experience of Responding Attorney

A. How many bankruptcy appeals have you handled before a District Court Judge?

_____ None _____ 5 or less _____ more than 5

B. How many bankruptcy appeals have you handled before the Bankruptcy Appellate Panels (BAP)?

_____ None _____ 5 or less _____ more than 5

C. How many of those cases filed before the BAP were also appealed to the U.S. Court of Appeals for the Ninth Circuit?

_____ None _____ 5 or less _____ More than 5

D. How many years have you been practicing law?

_____ Years

E. What percentage of your time is spent in bankruptcy law practice?

_____ %

II. Bankruptcy Appellate Process

A. Has appealing to the Bankruptcy Appellate Panels (BAP), instead of the District Court, proved to be more economical for your clients?

_____ Yes _____ No

If so, how? ____

____

B. Did filing your appeal before the BAP, instead of the District Court, expedite the appeal process?

_____ Yes _____ No

If so, how? ____

____

C. Did the BAP practice of holding mandatory conferences aid in the appellate process?

_____ Yes _____ No

If so, how? ______________________________

____

D. Would you have greater confidence in the correctness at a BAP opinion than in an opinion on a bankruptcy appeal to the district court?

_____ Yes _____ No

Why or why not? ______________________________

____

E. Are the BAP procedures for processing and ruling on motions an improvement over the district court procedures?

_____ Yes _____ No

If so, how? ______________________________

____

F. What recommendations, if any, do you have for improving the effectiveness of the Bankruptcy Appellate Panels?

If so, how? ______________________________

____

Please complete the following section if you have ever had oral argument before the BAP.

III. Oral Argument

A. Did the BAP process provide you with a reasonable opportunity to present your views to the panel during oral argument?

_____ Yes _____ No

B. Was oral argument helpful in resolving the issues on appeal presented by your case?

_____ Yes _____ No

C. Thoroughness of the panel's preparacion for oral argument.

1. Familiarity with the applicable law (whether substantive, procedural or both) including recent development in the applicable law?

_____ Excellent _____ Good _____ Fair _____ Poor

_____ Insufficient basis for rating.

2. Familiarity with the facts of the case and the arguments presented in the briefs?

_____ Excellent _____ Good _____ Fair _____ Poor

_____ Insufficient basis for rating.

IV. The Written Opinions of the Bankruptcy Appellate Panel

A. Are Bankruptcy Appellate Panels, through their written opinions, providing the Ninth Circuit with a uniform body of quality decisional bankruptcy law?

_____ Yes _____ No

If so, how? ______________________________________

____

B. Based on the BAP opinions you have read, how would you rate the writing style for:

1. Conciseness

_____ Excellent _____ Good _____ Fair _____ Poor

_____ Insufficient basis for rating.

2. Organization

_____ Excellent _____ Good _____ Fair _____ Poor

_____ Insufficient basis for rating.

3. Soundness of Reasoning

_____ Excellent _____ Good _____ Fair _____ Poor

_____ Insufficient basis for rating.

4. The Panel's application of relevant law to the facts?

_____ Excellent ______ Good _____ Fair ______ Poor

_____ Insufficient basis for rating.

5. Indication of why arguments contrary to the result were rejected?

_____ Excellent ______ Good _____ Fair ______ Poor

_____ Insufficient basis for rating.

6. Clarity in explanation of disposition of contested issues?

_____ Excellent ______ Good _____ Fair ______ Poor

_____ Insufficient basis for rating.

7. If you have rated the panels written decisions as poor, briefly explain the reason for that rating?

____

____

V. Overall Assessment of the Bankruptcy Appellate Panels

A. Would you like to see the Bankruptcy Appellate Panels continued?

_____ Yes _____ No

B. Should the BAP be expanded to other districts in the Circuit?

_____ Yes ______ No

C. If you have any further comments or suggestions on the Bankruptcy Appellate Panels of the Ninth Circuit, please note them below:

____

____

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APPENDIX B

I. General

1. If your District does have a panel, how has its existence affected your workload?

_____ Increased workload _____ Decreased workload

_____ No effect _____ Unable to say

Please explain: ______________________________

____

2. Do you recommend continuing the Bankruptcy Appellate Panels in the Ninth Circuit?

_____ Yes _____ No

Please explain your answer: ______________________________

____

3. Do you recommend expansion of the panels into other districts of the Ninth Circuit?

_____ Yes _____ No

Please Explain: ______________________________

____

4. Do you have any suggestions for ways in which the Bankruptcy Appellate Panels might be improved?

Please list these below:

____

____

II. Written opinions of the Bankruptcy Appellate Panels

A. One of the goals of the panels is to establish a uniform body of decisional Appellate Bankruptcy Law in the Ninth Circuit.

Are the panels accomplishing this goal?

_____ Yes _____ No

B. Rate the Bankruptcy Appellate Panels' decisions with which you are familiar, comparing them with decisions filed by District Courts handling bankruptcy appeals. Please note whether Bankruptcy Appellate Panel (BAP) decisions are superior, on the whole, similar, or inferior to the District Courts.

1. Application of relevant law to the facts

_____ Superior _____ Similar _____ Inferior

2. Indication of why arguments contrary to the result were rejected

_____ Superior _____ Similar _____ Inferior

3. Clarity in explanation of disposition of contested issues

_____ Superior _____ Similar _____ Inferior

4. Clarity and completeness in explanation of action to be taken after remand

_____ Superior _____ Similar _____ Inferior

5. Understanding of the complexity of the issues involved in the appeal

_____ Superior _____ Similar _____ Inferior

6. Speed with which a bankruptcy appeal is processed and a decision is filed

_____ Superior _____ Similar _____ Inferior

Please feel free to comment further on any of the questions you answered in Section II

____

____

____

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APPENDIX C

I. General

1. Do the Bankruptcy Appellate Panels (BAP) operate in your district?

_____ Yes _____ No

2. If the BAP does operate in your district, how has its existence affected your workload?

_____ Increased workload _____ Decreased workload

_____ No effect _____ Unable to say

Please explain: ______________________________

____

3. Do you recommend continuing the Bankruptcy Appellate Panels in the Ninth Circuit?

_____ Yes _____ No

Please explain your answer: ______________________________

____

4. Do you recommend expansion of the panels into other districts of the Ninth Circuit?

_____ Yes _____ No

Please Explain: ______________________________

____

5. If you are familiar with the panels procedures, do you have any suggestions for ways in which the Bankruptcy Appellate Panels might be improved?

Please list these below:

____

____

6. One of the goals of the panels is to establish a uniform body of decisional Appellate Bankruptcy Law in the Ninth Circuit. Are the panels accomplishing this goal?

_____ Yes _____ No

Please feel free to note any additional comments you may have concerning the BAP.

____

____

APPENDIX D

I. General

1. Have you had any experience with appeals filed from decisions of the Bankruptcy Appellate Panels?

_____ Yes _____ No

If so, how many? ______________________________

____

2. Do you recommend continuing the Bankruptcy Appellate Panels in the Ninth Circuit?

_____ Yes _____ No

Please explain your answer: ______________________________

____

3. Do you recommend expansion of the panels into other districts of the Ninth Circuit?

_____ Yes _____ No

Please Explain: ______________________________

____

4. Do you have any suggestions for ways in which the Bankruptcy Appellate Panels might be improved?

Please list these below:

____

____

II. Written opinions of the Bankruptcy Appellate Panels

A. One of the goals of the panels is to establish a uniform body of decisional Appellate Bankruptcy Law in the Ninth Circuit.

Are the panels accomplishing this goal?

_____ Yes _____ No

(Over)

B. Rate the Bankruptcy Appellate Panels' decisions with which you are familiar, comparing them with decisions filed by District Courts handling bankruptcy appeals. Please note whether Bankruptcy Appellate Panel (BAP) decisions are, on the whole, superior, similar, or inferior to the District Courts.

1. Application of relevant law to the facts

_____ Superior _____ Similar _____ Inferior

2. Indication of why arguments contrary to the result were rejected

_____ Superior _____ Similar _____ Inferior

3. Clarity in explanation of disposition of contested issues

_____ Superior _____ Similar _____ Inferior

4. Clarity and completeness in explanation of action to be taken after remand

_____ Superior _____ Similar _____ Inferior

5. Understanding of the complexity of the issues involved in the appeal

_____ Superior _____ Similar _____ Inferior

Please feel free to comment further on any of the questions you answered in Section II

____

____

____

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Judge **George**. Thank you very much, Mr. Chairman.

The **Chairman**. All right, we will be glad to hear from others.

Judge **Mabey**. Mr. Chairman, I will waive any opening statement and be pleased to respond to any questions which may be asked by the panel.

The **Chairman**. We would be glad to hear from you.

Judge **Gandy**. Mr. Chairman, I am Dean Gandy, and I have already given my statement at an earlier time. We will be glad to answer any questions.

The **Chairman**. The Supreme Court has held that parties cannot be compelled to litigate in settling disputes before an article I bankruptcy judge.

In your view, could an article I court hear such disputes if the parties consented to jurisdiction? I would be glad for anyone to answer that who wishes to.

Judge **George**. Historically, that was the case under the old act, Senator. I would suppose, certainly, that new legislation would have to be passed, because there is a general feeling that the decision has completely done away with the jurisdictional provision altogether. But that was done historically, with the consent of the parties.

Judge **Gandy**. In footnote 31, Senator, the opinion, Justice Brennan indicates that he would have a problem, I believe, even with consent, at least that it had never been approved by the Supreme Court.

The **Chairman**. If the Congress opts for an article I bankruptcy court, would the Conference, in your view, prefer the limited jurisdiction of the court or preserve present jurisdiction by granting greater appellate review authority to the district courts?

Judge **Gandy**. Well, I think that I speak for everyone in saying that we would, if that were the choice, prefer the broad jurisdiction with appellate review.

The **Chairman**. Any other answers?

Judge **Kline**. The thing that disturbs me about that is that, with all due respect to the four opinions that are filed, there isn't anyone regardless of ability that can advise this committee dependably on what can be done that will later be found to be constitutional—that's the distressing thing. The only thing that all of them agree on is the fact that if you have article III in some form, this is all right. You have had 8 years of congressional consideration of act—it was not enacted under duress of depression or even recession. You are simply considering whether you are going to dismantle the court. To me this is the thing that makes it a very hard-core decision. I don't believe there is a way to draft it with certainty. Anyone that says they have redrafted this jurisdiction in a dependable way, can only find out for certain 3 years from now. What the parties, litigants, and all interested persons will be put to will be unbelievable. There is no guess what the Court will then do.

Judge **George**. Mr. Chairman, I have the same kinds of difficulties. It would seem to me that, indeed, the division within the Supreme Court itself, and the various opinions issued in the *Marathon* case, underscore the difficulty and uncertainty that would exist in any attempt to define a constitutionally acceptable subject matter jurisdiction and powers for an article I bankruptcy court.

If it were possible—we had hoped it had been done before, but I sat on the bench before enactment of the new code, and the maze of difficulties one runs into with this jurisdictional problem is terribly disturbing and wasteful to counsel and to the court.

The **CHAIRMAN**. If the bankruptcy courts were given article III status, would the Congress be pressured at a later date to create a new class of bankruptcy magistrates to hear routine matters in small claims type bankruptcy cases, such as no asset filings?

Judge **GANDY**. At the present time, particularly in U.S. trustee districts, a similar type system exists to a limited extent. I really don't know what——

Judge **KLINE**. Well, actually the costs of the present order, whether you are in a pilot or a nonpilot district, will not have to be changed. You see, the bankruptcy judge has nothing to do with the old first meeting of creditors now. That is handled by an estate administrator in the nonpilot districts and by the U.S. trustee in pilot districts. There should be no reason for any pressuring. That administrative duty can properly be handled there. The judge ought to handle only the matters that really are related to the business problems and the judicial determinations. I can't conceive of anyone being able to sell that along the line.

The **CHAIRMAN**. As you know, the Senate has before it legislation that would impose a future income threshold test on persons seeking chapter 7 relief. The Conference has previously expressed opposition to this legislation on the grounds it would complicate chapter 7 litigation and require decisions regarding a debtor's ability to pay that the courts are not equipped to make. Today, as article III district court judges, however, make such determinations daily, and they barely bring the ability of a legitimate debtor to satisfy his obligation to the court. State courts make such decisions daily in domestic relations cases and similar matters.

If the Congress were to grant bankruptcy judges article III status, would that enhance their ability to apply a future incomes threshold test in chapter 7 cases, such as would be required if the Senate bill 2000 were to become law?

Judge **KLINE**. I don't think it makes any difference. If we have to meet that issue, we will deal with it regardless what the title is, and I don't see any basic difference in making that determination.

Judge **GEORGE**. I would agree, that we would have no problem handling those matters if that became law, but it would take judicial time.

The **CHAIRMAN**. I am going to ask the distinguished Senator from Alabama, former chief justice of the State of Alabama, to preside.

[Senator Heflin assumed the chair.]

Senator **HEFLIN**. The Congress has passed, last year I believe it was, a magistrate's act on consent which pretty well allows the magistrate to try any civil case, provided consent is given, even a jury trial. The chairman raised some question on the issue of consent in bankruptcy litigation that would also be applicable to present magistrate law. Would it be possible for bankruptcy judges to be designated as bankruptcy magistrates?

Judge **MABEY**. Let me just note that the difficulty I see with the consent problem is that typically in a forum where there isn't enough money to go around, one party has the asset and the other party wants it. And therefore the likelihood of consent is very slim. For instance, in the District of Utah, if one looked at our docket, one would see farmers who have filed seeking a chance to get their crops harvested this fall, and also contractors who file hoping to hang on through the difficult construction period. Both of those entities have money in the bank; they need to get the money out to pay their employees; the bank has the money, the business wants the money. The likelihood that the bank would consent to jurisdiction in order to get the matter resolved more quickly seems small because it is in the bank's interest in that event to delay the matter.

The question, I don't think, is whether these entities should get the money or not—that is a legal question that needs to be determined—but the question is, can the decision be made promptly so that there still is a viable entity which can receive and react to the decision.

It seems to me that in this context it is unlikely that the consent method would solve the problem, and, indeed, consent was already a jurisdictional basis before the Reform Act was passed, and was found by Congress to be an inadequate jurisdictional basis.

Judge **Kline**. Mr. Chairman, could I just emphasize that the only thing that probably all knowledgeable persons were agreed on was the fact that to have bankruptcy reform of any consequence you had to have pervasive jurisdiction in a single forum. Now, they have argued about a hundred other things, and will continue to, as to substantive provisions, but when it got right down to the end, the largest banks to the smallest consumer interest agreed, well, it's not a perfect act, but it is essential to have all the authority in one spot. And when you nibble away that authority, for all practical purposes, under any guise or for any reason, and when you can't bring these parties in with the clear understanding they are looking at the person who has the authority to do something, even if it's wrong—to do something, you have absolutely crippled all that might be identified as bankruptcy reform, in my judgment.

Senator **Heflin**. What are the problems in making the bankruptcy judges article III judges? They would have to be Presidential appointments, because we start into a Presidential appointment I believe in 1984 under the Bankruptcy Act. But you would also have to make lifetime appointments under article III.

Now, faced with an October 4 deadline, and obviously the mechanism by which appointments are made would be impossible to follow. Is there any way that the present bankruptcy judges could be grandfathered in? What are the problems that confront article III appointments if that's what we were to go with.

You have mentioned some, I understand, a while ago, Judge Gandy.

Judge **Gandy**. Yes; various alternatives have been suggested. I do not think it is a coincidence that October 4 was selected by the Supreme Court, the beginning of its term. It has been suggested that there is the possibility of an extension of that time. If that possibility did not materialize, there are thoughts that if Congress enacted a bill providing for article III status in bankruptcy courts, but the appointment process could not be implemented in time, that under the *Glidden* case the existing judges could continue to exercise pervasive jurisdiction until the process could be completed and article III judges take over.

Senator **HEFLIN**. As we understand it, the judicial conference is in unanimous opposition to this. Your situation would call for the cooperation of the Supreme Court, were Congress to follow this course. I don't know whether you could get that cooperation or not. But in the normal course of events, suppose Congress declares that all bankruptcy judges must be article III and authorizes the appointment of those, you would have to go through the advise and consent process. Is there any other way to go through it other than to go through the Presidential appointment route by which you would appoint, and then the Senate would advise and consent on the appointment? Is there any other way that you think it could be done constitutionally?

Judge **GANDY**. There is a difference of opinion on that.

Senator **HEFLIN**. What are the schools of thought?

Judge **GANDY**. One school of thought is that there could be a constitutional fold-in. I think probably——

Senator **HEFLIN**. A constitutional what?

Judge **GANDY**. Fold-in of existing judges.

Senator **HEFLIN**. Grandfathering?

Judge **GANDY**. Yes.

Senator **HEFLIN**. I am more familiar with that term than "fold-in."

Judge **KLINE**. On the theory that although the Congress cannot appoint the judges in that sense, since they were court-appointed, which was authorized, you could say, well, this was not the Congress, in effect, appointing.

Senator **HEFLIN**. How would the President participate in a fold-in? Would he have to?

Judge **KLINE**. He would not.

Judge **GANDY**. He would not, and that is the argument of the opposition. The other school of thought, which says there cannot be a fold-in, and there must be ultimately a Presidential appointment. But, you see, whether or not you did it before October 4, you would be, in the words of Justice Brennan, in the *Marathon* case, you would be reconstituting the bankruptcy courts, you would be making an effort to make them constitutionally pass muster. And if that happened, the argument is, under the *Glidden* case, that is all you have to do.

Senator **HEFLIN**. Let me ask you this, do you think there is any possibility of categories of article III judges?

Judge **GANDY**. Yes; we think that bankruptcy courts can make less money, don't have to have all the law clerks, even to wear yellow robes, don't have to have all the panoply of an article III court, that there can be a difference.

Judge **KLINE**. In that regard, Mr. Chairman, to me personally it is essential that there is a difference. First of all, politically it represents probably the only chance; and, second, though, for bankruptcy's sake—you see, the original problem was, when you had article III judges, bankruptcy worked its way down low on the list of priorities. I think these judges ought to be identified, put the salary wherever you want to—you just can't reduce it, that's all; put it where you want to, make them do the job. But give them life tenure. That's the only thing it takes to qualify. Then restrict it any way you want to, and, among other things, insist that this court only deal with bankruptcy cases, you cannot be assigned to the district court or the court of appeals. Such will not only take a little pressure off of those who are a little concerned about the dilution of authority that goes with being a full-fledged article III, but it also will guarantee that the bankruptcy judges will do what they are appointed to do—and that is to give top priority, exclusive attention to these business matters, which you threaten immediately if you make them exactly the same as district judges.

Senator **Heflin**. Well, that violates the rationale and the thoughts that most of the judicial architects, in studying judicial systems, have advocated, is that you ought not to have specialized courts.

Judge **Kline**. We are already there, though, Mr. Chairman.

Senator **Heflin**. Well, I understand that, and there are specialized courts throughout the country. But modern judicial thinking is that that is a bad method and a bad system. Of course, in regards to this, whether or not you attempt to specialize there are other areas; there are also areas that some people feel that you ought to go ahead and maybe have a two-tier Federal judiciary, since you have just about got it anyway, with magistrates and other things, and have fixed jurisdiction of certain types of maybe class B judges as opposed to class A judges. I don't know whether that is good or bad; just some thoughts.

Well, let me ask you this: What do you think is going to happen if Congress, for whatever reason, doesn't enact any legislation in response to the *Marathon* decision by October 4?

Judge **Gandy**. Well, I will state I think bankruptcy as a viable option in the settlement of debtor-creditor relations is eliminated.

Judge **George**. I would think a practitioner would probably feel compelled to file any petition with the district court. It seems clear to me, from reading the plurality and the concurring opinions and, in particular, the nonseverability concept of Justice Rehnquist, that we would have no authority, and I would think a safe practitioner would probably choose to file a petition with the district court.

Judge **Kline**. Let me qualify that. As to that safe practitioner—I would like to have the job of challenging the authority of the U.S. district court to handle those matters in these cases, and it will be litigated. If there is one thing that was clear out of this bankruptcy reform it was that the authority was to be set exclusively in the bankruptcy court. The district court, other than entertaining appeals and exercising certain contempt authority, was to have nothing to do with it. And you talk about spawning litigation that is remarkable. We have 680,000 pending bankruptcy cases. With the pending district workload. there are 54 additional district judges being requested of Congress right now. At this time there are 220 full-time bankruptcy judges, to my personal knowledge, more or less, working 50 hours a week. And the serious suggestion that the district court in any way could in a meaningful way deal with anything that would be helpful in bankruptcy administration is a practical as well as a legal absurdity, if you are on the ground and really look at it.

In fact, I really feel if I were a U.S. district judge and thought there was any chance I would get some of this bankruptey work back, I would be out lobbying against it. It is so impractical in terms of its application that it staggers me at the mere suggestion of it.

Judge GEORGE. I must say that I agree that it is certainly not practical, but I think that the bankruptcy court would be without authority, Senator Heflin.

Judge MABEY. I think there may be some question as to who would have authority. Section 241 of the Reform Act appears to have been struck down, and one of the last footnotes, footnote 40 to the opinion I think, casts a shadow over everybody's jurisdiction, including the district court's.

Senator HEFLIN. Suppose that Congress were to eliminate the 1978 Reform Act's grant of plenary powers to the bankruptcy court. What are your thoughts or recommendations as to how Congress could act to reduce the litigation to determine what is covered by a bankruptcy court's summary jurisdiction?

Judge GANDY. You would be talking about a return to the pre-1978 type bankruptcy court jurisdiction, and your question is how could Congress reduce the number of bankruptcy filings and bankruptcy work?

Senator HEFLIN. Well, how would you act to reduce the litigation to determine what is covered by a bankruptcy court's jurisdiction?

Judge KLINE. Mr. Chairman, in all due respect, we would do just like we did before. The statistics showed, prior to the 1978 reform, that between 3½ of the bankruptcy courts' time was spent trying to decide whether or not it had the authority to make the mistake. And we would be right back there with spades with these additional ramifications and shades that are thrown here in the opinion.

Senator HEFLIN. That's a good observation, because there certainly was a tremendous amount of litigation on jurisdiction.

Judge GANDY. I would like to be practicing bankruptcy law at that time.

Judge KLINE. You may be. [Laughter.]

Judge GANDY. Then my wife will be happy.

Judge MABEY. I think the tension in the former practice was simply because, as a practical matter, the bankruptcy court needed extensive jurisdiction to resolve disputes economically. But as a theoretical matter it may not have had that jurisdiction, and the commentators began to speak of jurisdiction by ambush, which is to say that the appellate courts developed whatever jurisdictional fiction they could to justify the bankruptcy court handling the matter: Waiver, implied consent, constructive possession of assets, and the like.

I think it would be hard to plow around those disputes if we went back.

Judge GEORGE. We have already chatted, incidentally, about the specific kind of litigation, and, Senator Heflin, I feel, again to repeat, that being able to pursue the kind of claim where you are "suing out" and you are seeking to bring assets into the estate may very well make the difference between a successful or an unsuccessful case. As I indicated, if attorneys knew that it was going to go—have to go to a State court or to some other court and 3 or 4 years would be involved, they would do so. I think, with the availability of the bankruptcy court to act quickly and promptly, a good many of those cases wouldn't occur. And even with that, as I indicated, I think we now have at least 50 to 100 *Marathon*-type cases in the southern part of the State of Nevada, and some of them involve millions of dollars that could be brought quickly into the estate. Under the old system, that could not happen.

Senator HEFLIN. Senator Dole, of course, is unable to be here, but his counsel is here. Mr. Velde, do you have some questions you want to ask this panel?

Mr. VELDE. Thank you, Mr. Chairman, just a couple of brief questions.

First, we understand that the Administrative Office of the U.S. Courts estimates that the annualized cost for a district court judgeship approximates $300,000, an annualized cost for a bankruptcy judge is currently running about $185,000, and for a magistrate about $135,000. If this committee or the Congress does convert bankruptcy judges to article III status, would your group be willing to provide some sort of cost estimates as to what the minimal amount or what are the variables that account for this difference and which might be needed to accommodate article III status as opposed to your current status?

Judge KLINE. Certainly. We will be delighted to do so. But may I now state for the record: Other than if you decide to give the article III, bankruptcy judges, which you are going to probably have to, something more than has been given the article I by way of retirement, with that exception you can leave the court right in place where it is and, for all practical purposes, I don't see why there should be any immediate increase in cost unless along the time additional bankruptcy judges are needed. That's the beauty of having a shaved-down article III bankruptcy judge. You can form him in any way you wish. Make him do his job, and keep the costs in line. The bankruptcy courts are all there. We are operating. This baby has been born. We are merely talking about whether or not you are going to legitimize it—I mean, the baby is here and functioning. There is nothing that we are asking you to create or bring into existence.

[Subsequent to the hearing Judge Kline supplied the following information:]

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF OKLAHOMA
8TH FLOOR-POST OFFICE BLDG.
201 DEAN A. McGEE AVE.
OKLAHOMA CITY 73102

CHAMBERS OF
DAVID KLINE
U. S. BANKRUPTCY JUDGE

TELEPHONE: FTS-736-5141
COM.-405-231-5141

August 3, 1982

Honorable Bob Dole
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: Senate Judiciary Committee Hearing,
July 22, 1982 (Northern Pipeling Construction
Company v. Marathon Pipeline Company)

Dear Senator Dole:

Thank you for the privilege of appearing before the full Committee on July 22nd concerning the Marathon problem. At such hearing Richard W. Velde, Chief Counsel and Staff Director of the Subcommittee on Courts made inquiry regarding the understandable concern of the anticipated expense entailed with Article III bankruptcy judgeships in contrast with Article I judgeships and invited a written memorandum for the record. This inquiry stemmed from a "Cost to the Judiciary of Establishing a New District Judgeship" prepared in the A.O. Budget Branch under date of February 22, 1982 (a copy of which is attached). This study indicates an annual recurring cost of $309,000.00 in the case of the Article III district judge and $150,500.00 annual recurring cost as to the Article I bankruptcy judge.

The changing of existing Article I bankruptcy judge positions to mini-Article III judgeships need not result in any substantial budgetary increase. In fact, the cost increase, in all likelihood will be less than should the Congress be tempted to retain Article I status for bankruptcy and split off certain "plenary" duties to Article III district judges. Such can only result in costing more money than less. The inefficiency of a two-tier court system is historical and apparent. Additionally, assuming the district courts could handle bankruptcy plenary matters with equal dispatch, which is questionable in light of all other onerous district court burdens, the function must be performed by the more costly full-fledged Article III judge, in contrast with the mini-Article III bankruptcy judge. First of all, there are 222 U. S. bankruptcy judge positions in action, fully staffed and equipped. There will be no initial (first-year) cost of any amount.

As to recurring annual expense this bill need not be a "money bill" in any real sense. The principal difference between a district judgeship and a bankruptcy judgeship is found in salary differential, two law clerks instead of one and an ungraded court reporter permanently attached.

As to salary differential the Congress must determine what if any change should be made between the $58,500.00 presently being drawn by the bankruptcy court in contrast with the $70,300.00 paid the district court. For now, the Congress could choose to leave it as is. Additionally, there is no reason why in any bankruptcy court it would be necessary to have more law clerks than presently serving. Ideally, each bankruptcy court should have a court reporter regularly attached but the bankruptcy court has been functioning effectively since October 1, 1979 with contract reporters and such could be left unchanged.

As I mentioned at the time of my oral testimony I do believe the Congress will have to make some added provision for retirement benefits for new Article III bankruptcy judges in contrast with the present Civil Service under which the Article I bankruptcy judges are serving in order to attract capable appointees. Even on this it should be noted that the "agency contribution for life insurance, health benefits, and the judicial survivors' annuities fund" for each district judge as a recurring expense is presently at $3,700.00 while the present appropriation for each full-time bankruptcy judge on these items is $5,000.00 annually.

It cannot be over emphasized that there are 222 full-time bankruptcy courts presently functioning with personnel, libraries, furniture and courtroom facilities in place. It is not a matter of now establishing a single new U. S. bankruptcy judgeship; and there absolutely is no need for the present budget to be financially burdened.

Sincerely,

David Kline

DAVID KLINE
U. S. Bankruptcy Judge

DK:vf

COST TO THE JUDICIARY OF ESTABLISHING A NEW DISTRICT JUDGESHIP

Appropriation: Salaries of Judges	
Salary of the Judge	$ 70,300
Agency contribution for life insurance, health benefits, and the Judicial Survivors' Annuities Fund	3,700
TOTAL	74,000
Appropriation: Salaries of Supporting Personnel	
Salaries: Law Clerk, Grade JSP-12	28,245
Law Clerk, Grade JSP-12	28,245
Secretary, Grade JSP-10	21,449
Court Reporter, Ungraded	31,627
Agency contribution for retirement, life insurance, and health benefits	10,434
TOTAL	120,000
Appropriation: Expenses of Operation and Maintenance of the Courts	
Travel, Judge and staff	12,000
Library: Initial cost	32,000 NR
Annual cost (second and succeeding years)	(4,000)
Word processing equipment rental	6,000
General office equipment	6,000 NR
Miscellaneous expenses (communications, supplies, etc.)	10,000
TOTAL (initial cost)	66,000
TOTAL (annual recurring cost)	31,000
Appropriation: Space and Facilities	
Rental of space	58,000
Tenant alterations and other reimbursable services	12,000
Furniture and furnishings	65,000 NR
Replacement and rehabilitation of furniture and furnishings (recurring)	(7,000)
TOTAL (initial cost)	135,000
TOTAL (annual recurring cost)	77,000
Appropriation: Administrative Office of the United States Courts	
Salaries and expenses of clerical staff (unit cost based on a ratio of one clerical position to every four new judgeships)	7,000
GRAND TOTALS:	
Initial (first year) cost	$402,000
Annual recurring cost	$309,000

NR Nonrecurring expense

Prepared in: A.O. Budget Branch
Date: February 22, 1982

COST TO THE JUDICIARY OF ESTABLISHING A NEW FULL-TIME BANKRUPTCY JUDGE

Appropriation: Salaries and Expenses, Bankruptcy Courts	
Salary of the Bankruptcy Judge	$ 58,500
Agency contribution for retirement, life insurance, and health benefits	5,000
TOTAL	63,500
Bankruptcy Judges Staff	
Salaries: Law Clerk, Grade JSP-12	28,245
Secretary, Grade JSP-10	21,449
Agency contribution for retirement, life insurance, and health benefits	4,806
TOTAL	54,500
Miscellaneous Expenses	
Travel, Bankruptcy Judge and staff	6,500
Library: Initial cost	30,000 NR
Annual cost (second and succeeding years)	(4,500)
Security investigation	3,500 NR
General office equipment	9,500 NR
Miscellaneous expenses (communications, supplies, etc.)	8,500
TOTAL (initial cost)	58,000
TOTAL (annual recurring cost)	19,500
Appropriation: Space and Facilities, The Judiciary	
Rental of space	40,000
Tenant alterations and other reimbursable services	8,000
Furniture and furnishings	45,000 NR
Replacement and rehabilitation of furniture and furnishings (recurring)	(5,000)
TOTAL (initial cost)	93,000
TOTAL (annual recurring cost)	53,000
GRAND TOTALS:	
Initial (first year) cost	$269,000
Annual recurring cost	$190,500

NR Nonrecurring expense

Prepared in: A.O. Budget Branch
Date: February 22, 1982

Mr. **Velde**. Well, you may not have all the trappings of article III status—square feet of courtroom space and whatever.

Judge **Kline**. It's not that bad now. Really, on balance, they have done a real fine job, they've made a real good effort.

Judge **Gandy**. We are trying jury cases now, we are trying the large cases. Speaking of a specialized court, of course, in the sense that you try bankruptcy cases, it is a specialized court. But I have tried cases involving property settlement agreements arising out of divorce where creditors' rights were not being considered, cases involving forfeiture of racketeering moneys, all kinds of cases. The courts are in place and ready to try under the expanded jurisdiction.

Judge **George**. At the same time, I think that the code—Congress has done a remarkable job, Senator Heflin; in most respects, I find if I really study I can almost always find an answer to a perplexing problem. But one thing that you have done that I think is extremely important is provide for abstention. And I think the judges, as time passes, will learn to abstain wisely from cases that don't affect the case directly; for example, it would be nonsensical to be trying an insurance case where insurance is really going to pay—those kinds of things the court should abstain from. And yet it is so important, in my judgment, to allow the bankruptcy judge to be directing traffic, if you will, and to determine the order of their litigational priorities—and you have allowed us to do that, and yet you have given us the opportunity to abstain from those things that aren't really needful in administering the estate. And that is being done.

Mr. **Velde**. Chairman Thurmond, in his opening statement, suggested that there may be situations in which bankruptcy judges' volume of business might decrease, that the volume does fluctuate according to economic conditions, proposals pending in Congress to change the bankruptcy laws might also have an adverse effect on your current—or salutory effect on your current workload, as the case may be.

Is it contemplated that with reduced bankruptcy workloads, the new article III bankruptcy judges might be available to pursue other article III responsibilities, serving on district court panels or whatever, if workload permits?

Judge **Gandy**. Yes; I think that would be contemplated. There is this problem, however, that if under nonbankruptcy statutes such as the Speedy Trial Act, if there was too much of a need for bankruptcy courts in other areas, the ability of the bankruptcy court to function quickly in bankruptcy matters might be lost. I would think that the statute could provide for exclusive dedication to bankruptcy at this time, because certainly the judges are needed, but with the right in Congress to change that at a subsequent time if the needs in nonbankruptcy areas increase.

Judge **Mabey**. I would point out that of course under the present system where article III judges assist one another, that assistance is given only when the judge agrees that he can leave his district and his bench in order to help out. That system could be included in this new article III responsibility so that the bankruptcy court came first, and only where additional manpower was available that it would be devoted to assist other courts.

Mr. **VELDE**. Of course, workload and case assignments might well be the prerogative of the chief judge of the district court of the district in which the bankruptcy judge was sitting, as well as other article III judges.

Judge **KLINE**. Yes; and that can be a very regrettable—and would be probably a very regrettable condition, the divorcement of the function.

Mr. **VELDE**. At least one Federal bankruptcy judge has recently found some common law jurisdiction—I refer specifically to the jailing of a certain individual in a recent grain elevator bankruptcy. Is there any other common law jurisdiction that might be invoked in case Congress fails to act by October 4?

Judge **KLINE**. Not that we are publicly admitting. Some of it may be rather common.

Judge **MABEY**. The question may be facetious; however, I would point out that there is a——

Mr. **VELDE**. No; I don't think it is.

Judge **MABEY** [continuing]. A Federal common law, which is not infrequently applied by Federal courts of all kinds, and Federal bankruptcy courts are no exception. For instance, when the Federal bankruptcy court is called upon to determine whether a debt has been incurred fraudulently, that term is nowhere defined and the court may well be called upon to look at Federal common law in order to determine the issue of fraud.

Mr. **VELDE**. Thank you, Mr. Chairman.

Senator **HEFLIN**. Well, thank you, gentlemen, we appreciate it. If you wish to supply us any written information, alternatives to article III—not to say it isn't possible, but I do think you face a real problem even if you created article III. You have got a transitional period you would have to go through, and I think we need as much advice on alternatives that might be available.

[The prepared statements of Judges Gandy and Kline, with additional submissions follow:]

DEAN M. GANDY

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214/767-[illegible]

July 18, 1982

The Honorable Robert Dole
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Dole:

It is an honor to be asked to testify before the Senate Judiciary Committee at the hearings slated for Thursday, July 22, 1982, and this letter will be the summary outline of the principal points to be made during my oral remarks as requested in your letter of July 12th.

1. The Scope of the Supreme Court's Opinion in Northern Pipeline Construction Co. v. Marathon Pipeline Co., Et Al.

Justice Brennan's plurality opinion begins by describing "the question presented" as being "whether the assignment by Congress to bankruptcy judges of the jurisdiction granted in §241(a) of the Bankruptcy Act of 1978 ... violates Article III of the Constitution." Thirty-six pages later, the plurality opinion concludes that "§241(a) of the Bankruptcy Act ... has impermissably removed ... 'the essential attributes of the judicial power' ... from the Article III district court, and has vested those attributes in a non-Article III adjunct. Such a grant of jurisdiction cannot be sustained ..." In his concurring opinion, Justice Rehnquist clearly states that this was the question decided by the plurality opinion, disagrees that it was necessary for the Supreme Court to make such a far-reaching decision, reasoning only that the narrow question of whether the exercise of the expanded jurisdiction under the 1978 Act (hereinafter called, in this statement, "the Code") in the particular Marathon situation was all that had to be decided, but he still concludes that, even as so limited, "this grant of authority is not readily severable from the remaining grant of authority to bankruptcy courts under §241(a)." He thus concurs in the result and casts a doubt on all of §241(a). Chief Justice Burger, in dissenting, attempted to limit the holding of the Court to the narrow range of Justice Rehnquist's concurrence, but this opinion is decidedly in conflict with the stated question and the stated holding of the plurality opinion. Accordingly, I must conclude that the holding of the Court is that §241(a) of the Code is unconstitutional to the extent it grants expanded jurisdiction to the bankruptcy courts.

Under §241(a) of the Code, a large amount of dispute-settling power was given to the bankruptcy courts. Basically that power involved "all civil proceedings arising under Title 11, or arising in or related to cases under Title 11." But, that was not the end of the grant of jurisdiction. In addition, the bankruptcy court, in 28 U.S.C. 1471(e), was given "exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case", a grant of power which was similar to jurisdiction granted to the bankruptcy court under Chapter XI of the 1898 Act (herein called, in this statement, "the Act").

It is important to understand that §241(a) also incorporated into bankruptcy the power to decide venue questions under §1472, §1473, and §1474; to decide questions regarding change of venue under §1475; to provide for removal of cases to the bankruptcy courts under §1478; to handle jury trials under §1480; and generally to exercise "all of the powers of a court of equity, law, and admiralty" under §1481, with the exception of the power to enjoin another court or to punish for criminal contempt. Without all of the broad jurisdictional definitions contained in the sections incorporated into the Code by §241(a), the vast bulk of jurisdiction now being exercised by the bankruptcy courts is eliminated.

This is emphasized by the discussion of Justice Brennan in the plurality opinion regarding the definition of "private rights". At pages 18 and 19 of his opinion, he concludes that private rights disputes lie at the core of the Article III power. He concedes that the prior cases of the Supreme Court attempting to differentiate between public and private rights are the subject of considerable confusion, but he indicates that "the liability of one individual to another under the law as defined" is a matter of private rights, and that this is a controversy which may not be removed from an Article III court. He seems to attempt to limit bankruptcy jurisdiction to "the restructuring of debtor-creditor relations", but to remove from that jurisdiction "the adjudication of state created private rights, such as the right to recover contract damages that" was an issue in the Marathon case.

It is important to understand that the "restructuring of debtor-creditor relations" must, of necessity, involve the determination of private rights in hundreds of cases decided every day by bankruptcy courts throughout this nation. It is also important to understand that those private rights were determined by bankruptcy courts prior to the enactment of the Code, and that in literally hundreds of thousands of disputes decided since 1898, the bankruptcy courts determined state created private rights in connection with their restructuring of debtor-creditor relations, and if the power to determine those private rights quickly, with finality, and with clarity in regard to jurisdiction is not present in the bankrutcy courts, there cannot be any bankruptcy law as we know it today, nor as it has been known in the past. It is, therefore, not surprising that every lawyer organization known to me that represents attorneys who practice before the bankruptcy court are shocked by the Marathon decision, and its effect on the adjustment of debtor-creditor relations in the bankruptcy court, and UNANIMOUSLY have taken, or apparently will take the position that Article III status must be given to the bankruptcy courts.

II. The Effect of the Decision Should Congress Fail to Enact Remedial Legislation by October 4, 1982.

If no remedial legislation is enacted, then the ability of the bankruptcy courts to function will be largely eliminated, and bankruptcy, as a viable option in solving debtor-creditor problems will no longer exist. Attached as an exhibit to this statement is a study that was quickly made of the disputed matters that were set in my court during May and June, 1982. Of those matters, at least 183, or 86%, represented, to some extent, a determination of private rights created by the state as defined by Justice Brennan. If the continued cloud on the power of the bankruptcy courts to decide those matters exists on October 4, then they will either have to be decided by district judges or by state courts with all of the resulting delays in their determination and all of the mechanical problems involved in changing courts and localities, employing new lawyers, and in not having decisions made by the bankruptcy specialists who serve on the bankruptcy courts. Untold damage will result to creditors whose dividends will be delayed, and to debtors whose discharges, rehabilitation in Chapter 11 cases, or fresh starts in life will likewise be delayed.

III. Possible Legislative Measures Sufficient to Resolve the Problem, With Particular Emphasis Upon Solutions Which Would Not Require Article III Status to Bankruptcy Judges.

There simply are no satisfactory alternatives that would satisfy the problem without Article III status in bankruptcy courts. I can think of only two possible, but unsatisfactory, solutions that would not involve Article III status in the bankruptcy courts:

(a) The creation of a large number of additional district judges to handle the flood of new business occasioned by the inability of the bankruptcy courts to function. The problem with this solution is that those judges will have no expertise in regard to bankruptcy, will be required to handle civil rights, criminal matters, and all of the other more glamorous issues handled by the district courts, and bankruptcy will tend to be relegated to a minor role. It must be understood that bankruptcy matters, up until recent times, have not received the publicity or recognition that other aspects of federal practice experienced. Bankruptcy, in the past, has been an extraordinary judicial action, little understood by the general public, the non-bankruptcy lawyer, or the non-bankruptcy judge. The early cases under the Act involved matters of insignificant dollar amounts, and the bankruptcy practitioner was not recognized as being of the same caliber as the general practitioner in the federal courts. However, with the depression of the 30's, the enactment of Chapters X and XI, and the general improvement of the bankruptcy courts since that date, all of this has changed, and the dollar amounts adjudicated by bankruptcy courts at the present time, as well as the effect on human lives is of great significance in our federal judicial system. To expect harried district judges to handle these matters in the expedited fashion they require, while conducting a full docket of non-bankruptcy-related matters, is not realistic. Furthermore, the resultant delay in decision making and in the closing of bankruptcy cases will represent significant losses to debtors and creditors.

(b) A return to the distinction between plenary and summary jurisdiction. I will, in my oral statement, describe very generally the history of the plenary/summary distinction, why it arose, and the problems it created. Its principal drawback was that there was no clear-cut line of distinction between the jurisdiction in the bankruptcy court and the jurisdiction in the district court, and millions of dollars in fees, expenses, and losses to creditors and debtors were wasted in arguments over where a case would be tried, instead of the basic issue of the merits of the lawsuit, how dividends could be paid to creditors, or debtors rehabilitated. There must be clarity in regard to jurisdiction in the bankruptcy court, and that clarity does not exist where a plenary/summary distinction is attempted. It is, thus, not surprising that lawyers support Article III status for bankruptcy judges, and have rejected a return to the absurdity of plenary/summary jurisdiction. It did not represent a satisfactory solution during the pre-Code days where there were 250,000 cases in this country, and clarity in regard to jurisdiction was one of the principal reasons for the enactment of the Code. It certainly will not represent a satisfactory solution now where there are 617,000 cases and essentially the same number of bankruptcy judges as before. However, if there is not a large increase in the number of district judges to imperfectly handle the dispute-resolving problems in the absence of Article III status for bankruptcy courts, then I can envision no other solution than a return to the pre-Code plenary/summary confusion.

For ten years studies were conducted in regard to the 1978 Code, and the correction of the problems that existed in bankrutpcy at that time. Chief among those problems was the lack of clarity in regard to jurisdiction, and the enormous waste of money and effort occasioned by the plenary/summary distinction, and the need to have a dispute-resolving court in bankruptcy with no jurisdictional questions hanging over it. Perhaps the chief contribution that the Code made to bankruptcy was an attempt to remove that lack of clarity in regard to jurisdiction. That attempt has failed because of the Supreme Court ruling in Marathon that expanded jurisdiction cannot be given to bankruptcy courts under the delicate, non-Article III compromise that §241(a) represented. Now, there is no other alternative but to face the problem foursquare, and to give to the bankruptcy courts the Article III status which Marathon and effective bankrtupcy administration requires.

I welcome any questions that the committee may have regarding these positions.

Very truly yours,

Dean M. Gandy
Bankruptcy Judge

DMG:jh

Enc.

200 West Monroe Street [illegible] Chicago, Illinois 60606 (312) 558-6900

EXHIBIT ACCOMPANYING LETTER OUTLINING
TESTIMONY OF DEAN M. GANDY BEFORE
SENATE JUDICIARY COMMITTEE, JULY 22, 1982

TYPE OF HEARINGS SCHEDULED MAY-JUNE, 1982 WITH ARTICLE III ISSUES

TYPE OF CASE	HEARINGS	
	Art. III Judge Possibly Required	Art. III Judge Not Required
Complaints to lift stay	51	
Discharge Day		
Discharges (No disputes, 64)		
Lien avoidances	12	
Reaffirmations	16	
Chapter 13 Confirmation Day		
Confirmations (No disputes, 38)		
Lien avoidances	15	
Motions to dismiss		2
Objections to discharge and exceptions to dischargeability	17	
Motions regarding: Remand and removal, to abstain, transfer, dismiss appeals, for injunctive relief, and to modify injunction	16	
Motions for summary judgment, applications to approve compromise, and motions to dismiss	14	
Objections to claims (involving 59 individual claims)	14	
Complaints for turnover of assets, objections to claimed exemptions	12	
Chapter 11 disclosure statement and confirmation hearings (§1129 issues present)		8 (?)
Attorney's fees, expense of litigation		7
Fraudulent transfers and preference actions	6	
Trials regarding validity of liens and status of secured claims	4	
Complaints to sell property free of liens		3
Applications to reject/assume executory contracts or leases	2	
Involuntary petitions		2
Collection of accounts receivable, suits on notes	2	
Options to convert to Chapter 7		1
2-day trial regarding breach of contract, etc.	1	
1-day jury trial re alter ego	1	
Other (miscellaneous conferences, distribution of settlement proceeds, applications of trustee for appointment of counsel ...)		6
TOTAL, excluding Discharges and Chapter 13 Confirmations	183	29
	86%	14%

WRITTEN STATEMENT OF DAVID KLINE, U. S. BANKRUPTCY JUDGE, WESTERN DISTRICT OF OKLAHOMA (FOR U. S. SENATE COMMITTEE ON THE JUDICIARY - July 22, 1982)

Mr. Chairman: I am David Kline, U. S. Bankruptcy Judge, Oklahoma City, Oklahoma. Thank you for your invitation[1] to testify concerning what Congressional action should be considered in light of the recent United States Supreme Court decision in *Northern Pipeline Construction Company* v. *Marathon Pipeline Company* (herein called "*Marathon*").[2]

Understandably, at this moment nothing could be of more interest to all who are identified with the bankruptcy court system and more significantly all those sensitive to what is taking place in the market place, the present plight of this nation's economy.

STATEMENT LIMITATIONS

None of my remarks are intended to encroach upon any of this Committee's prerogatives. Moreover, I do not speak for the Judicial Conference of the United States. Presently, I am a member of the Board of Governors of the National Conference of Bankruptcy Judges and Chairman of its Committee on Legislation.

SCOPE OF THE *MARATHON* DECISION

The precise effect of the *Marathon* plurality and concurring opinions doubtless is debatable. The final, conclusive debate will only be put at rest when the Supreme Court again speaks. Understandably, I personally preferred Mr. Justice White's dissent. Would it were the law. Bankruptcy Reform would be alive, well and effectively functioning. However, the controlling opinion and law is found in the concurred with plurality opinion written by Mr. Justice Brennan.[3] This opinion makes it clear that the new Bankruptcy Code cannot be serviced and served by Article I judges.[4] Simply stated the *Marathon* plurality opinion strikes down as unconstitutional the *entire* jurisdictional grant of Title 28 U.S.C. §1471(a) through (e); and the concurring opinion emphasizes that the "grant of authority is not readily severable.[5]

Remarkably, apart from the issue squarely presented on the broad jurisdictional sweep of §1471(b), as otherwise implemented, conferring "original but not exclusive jurisdiction of all civil proceedings arising under title 11", the majority made no effort to salvage §1471(a) granting "original and exclusive jurisdiction of all cases under title 11"; or §1471(e) granting the bankruptcy court "exclusive jurisdiction of all the property, wherever located, of the debtor, as of the commencement of the case."

EFFECT OF *MARATHON* ABSENT CONGRESSIONAL ACTION BY OCTOBER 4, 1982

Much of the work on this written statement was done prior to the receipt of Senator Dole's letter expressing specific points of interest including the express invitation for solutions "which would *not* require a grant of Article III status" to bankruptcy judges. With all due respect and regard, there is only *one* viable solution. It is my firm conviction that inaction by The Congress will result in a complete, total breakdown of the bankruptcy court function and process come October 5, 1982. In my judgment, the Code then falls. No incumbent bankruptcy judge will possess authority of significance or certainty. No other court stands empowered to act. The potential is too grave to consider.

THE SOLUTION

The single, overriding issue is whether the basic jurisdiction of this new Code court will be left intact or whether the Congress will be tempted to retreat toward pre-Code bankruptcy court frailties.

It is vital to sharply distinguish the undisputed desirability, the need to preserve basic bankruptcy court authority and control from good faith differences concerning substantive provisions of the bankruptcy Code.

In 1978, the one consensus reached by both Houses of Congress, after some eight years of legislative consideration, was that it was essential to create a bankruptcy court of expanded jurisdiction, and one functionally independent of, and divorced from, the U. S. district court./6

The Bankruptcy Act of 1978, doubtless is not perfect. It should be carefully monitered and refined as it is observed in action. But, on balance, this Act may well be one of the most thoughtful, well-considered pieces of legislation enacted in our time./7

Interestingly, the present day bankruptcy court while a highly specialized court/8 is one which also deals with the broadest issues of law, state and federal./9

Absent an inclination or preconceived urge to repudiate years of Congressional inquiry, it seems that Congress should approach Marathon with a total reluctance to tamper in any degree with the Code granted jurisdiction. The reasons justifying expanded jurisdiction remain sound. Three years under the Code, during hectic economic upheaval have confirmed the need. Moreover, to in any manner now reincorporate the United States district court into bankruptcy cases and procedures seems unthinkable. The reasons are apparent. Bankruptcy activity has become a high volume, top priority class of litigation requiring immediate attention and care. All associated with bankruptcy practice in pre-Code years understand the impracticality, the frustration associated with splitting or separating jurisdiction between two or more courts or unrealistically having judges function in a supervised or partial capacity without complete judicial authority.[/10]

Today there are some 220 full-time U. S. bankruptcy judges[/11] who by conservative estimate are working some 50 hours per week presiding over some 680,000 pending cases.[/12] Last year alone there were more than 520,000 cases filed.[/13] Additionally, a survey by the Bankruptcy Division of the Administrative Office of U. S. Courts preliminarily recommended that to properly man the bankruptcy court by April 1, 1984 some additional 80 judges will be needed.[/14]

No portion of bankruptcy court responsibility can or should be absorbed at the U. S. district court level. In most quarters, the number of presently constituted U. S. district judges is acknowledged to be insufficiently large to effectively and properly handle the present U. S. district court caseload.

Consequently, the basic Supreme Court objection to the Bankruptcy Reform Act hopefully will be directly and simply addressed by the Congress with an enactment which will provide bankruptcy judges constitutionally acceptable to do the job. Happily this can be done without running afoul of the understandable political reluctance to create substantial additional numbers of Article III district judges.

The clear, acceptable alternative seems authorized (if not invited) in Justice Brennan's plurality opinion.[/15]

The Supreme Court mandate is that bankruptcy court Code authority be exercised by a federal judge appointed and serving subject to "good behavior" at a salary not subject to reduction during tenure.[/16] Other than these two separation of powers musts, the terms and conditions of service by an Article III bankruptcy judge in contrast to the district judge, may and should be sharply curtailed.

Specifically, it is proposed:

> (1) Commencing April 1, 1984, bankruptcy judges be appointed by the President, by and with the advice and consent of the Senate, to hold office during good behavior.[/17]
>
> (2) Bankruptcy judges receive a salary equal to 90% of the salary of a United States district judge. Since the salary of district judges cannot be diminished such would comply with Marathon's concern as to possible salary reduction.
>
> (3) Bankruptcy judges be specifically barred from sitting on the district court or court of appeals.[/18]
>
> (4) Appeals from the bankruptcy court be routed through the district court as they are presently and that the option of permitting the chief judge of the circuit to appoint panels of bankruptcy judges to consider such appeals be retained.

> (5) The expanded jurisdiction of the bankruptcy court remain intact as the only reasonable and feasible solution to the expeditious handling of controversies arising in or related to bankruptcy cases.

Significantly, as impressive as the pendency of 680,000 or more bankruptcy cases is, and the obvious relief it is granting to hard-pressed individual, consumer bankrupts, the real, immediate national economic peril as related to viable court structure involves the some 85,000 pending business cases.[/19] This Title 11 court with expanded powers affords the only hope for business rehabilitation or orderly business liquidation.

As to numbers of persons touched, in all stations of life, and dollar amounts effected, the pressing economic conditions have made the bankruptcy court the most significant civil trial forum in America. Institutionally, it stands as the most critical single function fighting to preserve, with the least modification, our entire economic system as we have known it.[/20]

Traditionally, the bankruptcy court has been principally characterized as a haven for the financially unfit. In the last decade there has been a noteworthy shift. Today, all persons and companies large or small having financial problems and interests truly have no other workable alternative. All such parties in interest, from the largest secured creditor to the smallest unsecured one, have the common need to have an effective, supervising forum, supplying prompt one-stop full service. Skyrocketing legal fees and expenses, of themselves, make it vital to practical, marketplace due process to restrict all legal skirmishing to a single site.

At most the single bankruptcy forum offers hope for effective rehabilitation. At the least the forum affords the sole practical, prompt means for liquidation. As to timing, this new Code's appearance was notable.

Significantly, this Code is the first major revision of bankruptcy law in 40 years and the first entirely new Act since 1898. Moreover, it is the first, and only bankruptcy Act in American history not enacted "as a result of a national recession or depression." It was deliberately, carefully conceived.[21] Yet this Congressional action could not have been more seasonable in view of what has taken place and is going on "in the street". Harsh world economics challenge our entire way of doing things financially.[22] Present business conditions fall far short from ideal but there is no road back. Rhetoric will not suffice. Businesses large and small must be preserved to all extents possible. Individuals must be given practical protection. Farmers cannot be foreclosed out of business en masse.[23] And, it is not a matter of playing the debtor against the creditor. No one has a greater stake in seeing to it that our economic system survives than the lenders and the sellers (be they large or small).

To their credit, the plurality opinion, and the two concurring justices, although finding the grant of authority to judges serving for a term of years to be constitutionally unacceptable, evidenced a wise, sensible concern for the overpowering practical problems. Somewhat uniquely the majority stayed the effect of its opinion and judgment until October 4, 1982 to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws. (citing authorities)" (Emphasis added)[/24]

Unquestionably, the bankruptcy court can, should and is for the most part, abstaining from asserting jurisdiction over cases properly in other courts where the number of parties involved, or the issues relating to unsettled state law or other facts and circumstances would render abstention by the bankruptcy court advisable and be to the best interest of all parties in the case's administration.[/25] However, there must be this one forum with authority to make this basic abstention judgment. The litigation pending in other courts may deal with issues of dischargeability or nondischargeability of debt, all of which can only appropriately be dealt with in the bankruptcy court or it may be essential for the bankruptcy court to consider such pending causes of action as critical parts of claim determinations as they relate to plans of reorganization or liquidation. Additionally, the opportunity to encourage compromise enabling all interested parties to get on with their business affairs is greatly enhanced.[/26]

CONCLUSION

These remarks are not designed to defend any specific substantive Code provision or provisions although on balance this new Code is sound. The point of emphasis is that regardless what might properly be modified within the framework of this new Code as to substantative law features regarding the relationships and positions of creditors and debtors, the jurisdiction, the authority to consider all these matters must be kept in a single place in a forum devoting exclusive attention to these financial matters where there is both capacity and disposition to move with dispatch. This can only be done by manning the Bankruptcy Act with properly constituted Article III bankruptcy judges. Any other route or approach is doomed to ineffectiveness and failure.

In all earnestness we are talking about a real, imminent potential for both "crowds in the street" and unlighted offices on "Wall Street".

(FOOTNOTES - KLINE WRITTEN STATEMENT)

1) Telephone invitation, Doug Comer, Esq., July 12, 1982. Confirmed by letter, Sub-Committee Chairman, Senator Dole, same date. Letter received and read in Oklahoma City, Friday noon, July 16, 1982.

2) Nos. 81-150 and 81-546, decided June 28, 1982.

3) a) "The question presented is whether the assignment by Congress to bankruptcy judges of the jurisdiction granted in §241(a) of the Bankruptcy Act of 1978, 28 U.S.C. §1471 (1976 ed., Supp. III), violates Art. III of the Constitution."

b) "Having concluded that the broad grant of jurisdiction to the bankruptcy courts contained in §241(a) is unconstitutional, we must now determine whether our holding should be applied retroactively ...." *Marathon*, plurality opinion, p.37. Plurality opinion (*Brennan, Marshall*, Blackmun, Stevens). Concurring opinion (Rehnquist, O'Connor).

4) "We conclude the §241(a) of the Bankruptcy Act of 1978 has unpermissibly removed *most*, *if not all*, of 'the essential attributes of the *judicial power*' *from* the Art. III district court, and has vested those attributes in a non-Art. III adjunct...." *Marathon*, plurality opinion, p.36. (Emphasis added)

5) "... Because I agree with the plurality that this grant of authority is not readily severable from the remaining grant of authority to Bankruptcy Courts under §241(a) .... I concur in the judgment." *Marathon*, concurring opinion, p.4.

6) a) "A major impetus underlying this reform legislation has been the need to enlarge the jurisdiction of the bankruptcy court in order to eliminate the serious delays, expense and duplications associated with the current dichotomy between summary and plenary jurisdiction, a wasteful remnant of the referee system left over from the pre-Chandler Act era. For fully four decades, and more notably during the present decade, referees in bankruptcy have served as trial judges of the bankruptcy court whose orders are final unless a timely appeal is taken to the district court. Yet the jurisdictional limitations presently imposed on the bankruptcy courts have embroiled the court and the parties in voluminous litigation whose sole function is to determine whether the court possesses the requisite summary jurisdiction to determine the merits of issues often necessarily heard by the court in determining its jurisdictional question. Upon a finding that it lacks summary

jurisdiction, the bankruptcy court is required to dismiss the action, whereupon it is necessary for the parties to proceed anew with a plenary action in either the U. S. District Court or an appropriate state court to try issues already substantially tried in the summary proceedings before the bankruptcy court. Frequently, the liquidation of bankrupt estates and the rehabilitation of debtors are significantly prejudiced thereby.

The advent of the Rules of Bankruptcy Procedure, with their automatic reference of most bankruptcy matters to the referee in bankruptcy and their scrupulous insistence upon procedural due process, have underscored the absurdity of perpetuating these jurisdictional limitations in bankruptcy cases arising under title 11 and civil actions and proceedings arising under or related to cases under title 11.

It is the purpose of new section 164 of title 28, United States Code, in conjunction with 28 U.S.C. section 1334, as amended by section 216 of this act, to eliminate entirely the present jurisdictional dichotomy between summary and plenary jurisdiction. Therefore, except where the bankruptcy court abstains from hearing an action or proceeding arising under or related to a case under title 11, all cases under title 11 and all civil actions and proceedings arising under or related to cases under title 11 are to be before the bankruptcy judge." Senate Report No. 95-989, pp.17-18, fns. omitted.

b) "The concept of a bankruptcy court that is separate and independent from the district court has been nearly universally supported. The Commission on the Bankruptcy Laws proposed it. The National Bankruptcy Conference testified in support of the proposition. The Commercial Law League of America and the American Bankers Association urged the Subcommittee to create an independent court system. Finally, the American Bar Association, at its 1976 meeting and the Association of the Bar of the City of New York have called for the creation of an independent bankruptcy court.

During 35 days of hearings in the House and 20 days in the Senate, not one witness reached the conclusion that the present bankruptcy court system should be retained. The only opposition to the separation of the bankruptcy courts from the district courts has come from the Judicial Conference. Its opposition has been belated at best. Though there have been pending for over three years before the Bankruptcy Committee of the Judicial Conference two proposals that would have created independent bankruptcy courts, and though the Judicial Conference was requested to testify on those bills by each House of Congress, the Judicial Conference took no action until two months after the introduction of H.R. 6 on January 4, 1977." House Report No. 95-595, pp.18-19.

c) "The need for a functionally independent bankruptcy court has been demonstrated beyond question, first by the study and recommendations of the Commission on the Bankruptcy Laws of the United States by knowledgeable witnesses before the Subcommittee, in published commentary, as well as through long practical experience under the present referee system. A considerable body of opinion has developed in support of the establishment of a bankruptcy court separate from the United States district court, either as an article III court modeled after the present district court, as a separate article I court patterned after the U. S. Tax Court, or as a hybrid court consisting of an article I bankruptcy trial court appended to an article III court of bankruptcy appeals." Senate Report No. 95-989, pp.15-16, fns. omitted.

7) a) "In 1970, Congress created the Commission on the Bankruptcy Laws of the United States to study and recommend changes in bankruptcy laws. The Commission became operational in June 1971, and filed its final report with Congress on July 30, 1973. Its report was in two parts. Part I contained the Commission's findings and recommendations. Part II contained a draft of a bill to implement those recommendations. Senator Quentin Burdick, Chairman of the Subcommittee on Improvements in Judicial Machinery and a member of the Commission, and Senator Marlow Cook, a member of the Commission, introduced that bill in the 93d Congress as S.4026. No action was taken on the bill during the 93d Congress.

In the 94th Congress the Commission bill was again introduced by Senator Burdick as S.236. Senator Burdick also introduced an alternative to the Commission bill that had been drafted by representatives of the National Conference of Bankruptcy Judges. The Judge's bill, S.235, which differed in several major aspects from the Commission bill. Hearings on both bills commenced in late February of 1975 and continued through November of 1975. All interested parties were invited to give testimony on the bills. The Subcommittee on Improvements in Judicial Machinery heard from several hundred interested parties and had nearly 80 witnesses personally testify over 24 days of hearings. The hearings covered all aspects of bankruptcy law. Testimony was heard on the structure of the new bankruptcy courts, the relationships of laws to bankruptcies, tax aspects, consumer bankruptcies, business reorganizations, railroad reorganizations, and the effect and interaction of the securities laws in bankruptcy cases.

Throughout the remainder of 1975 and all of 1976 the committee continued to gather information and to begin work on a draft bill; however, no bill was reported to the full Judiciary Committee during the 94th Congress. Introduced in the House at this time were parallel bills to S.235 and

S.236 entitled H.R.31 and 32, and during the 94th Congress the House also held extensive hearings on the bankruptcy reform bills. The House culminated its actions with the introduction early in the 95th Congress of H.R.6 which was amended and reintroduced as H.R.8200. That bill was passed by the House on February 1, 1978.

S.2266, a bill, the analogous bill to H.R.8200, was introduced by Senators DeConcini and Wallop on November 1, 1977. The Subcommittee on Improvements in Judicial Machinery conducted further hearings in late November and early December, receiving testimony from nearly 60 witnesses and again receiving several hundred written statements and comments with regard to the bill. Subcommittee amendments as a result of the hearings, statements, and comments were made to the bill over the next five months and these efforts culminated in the reporting, by the subcommittee, on May 17, 1978, of a bill in the nature of a substitute offered. The report of the vote of the subcommittee was three in favor, none opposed, and one not voting." Senate Report No. 95-989, pp.1-2, fns. ommitted.

b) "In 1970, Congress created the Commission on the Bankruptcy Laws of the United States to study and recommend changes in the bankruptcy laws. The Commission became operational in June, 1971, and filed its final report with the Congress on July 30, 1973. Its report was in two parts. Part I contained the Commission's findings and recommendations. Part II contained a draft of a bill to implement those recommendations. Don Edwards, Chairman of the Subcommittee on Civil and Constitutional Rights and a Member of the Commission, and Charles Wiggins, then ranking minority Member of the Subcommittee and also a Member of the Commission, introduced that bill in the 93d Congress as H.R.10792.

The National Conference of Bankruptcy Judges disagreed with major aspects of the Commission's bill, and drafted and proposed an alternative. The Judges bill was also introduced in the 93d Congress by Messrs. Edwards and Wiggins as H.R. 16643. In the 94th Congress, both of these bills were again introduced, as H.R.31 and H.R.32, respectively.

Hearings began on both bills in the 94th Congress in May, 1975, and continued until May, 1976. The hearings were extensively publicized in the Congressional Record, and all interested parties were encouraged to present views to the Subcommittee. There were 35 days of hearings, over 100 witnesses, and over 2,700 pages of testimony. The hearings covered every aspect of bankruptcy law, from the structure of the bankruptcy system to the jurisdiction of bankruptcy courts, from consumer bankruptcy to business reorganizations, from the interaction of the securities laws with bankruptcy to the tax aspects of bankruptcy, from railroad reorganization to commodity broker liquidation.

After the hearings were completed, the process of bill drafting began. The result was H.R.6, cosponsored by Chairman Edwards, and by Mr. Butler, current ranking minority Member of the Subcommittee. Since the introduction of H.R. 6, the Subcommittee has received numerous comments from the bench, the bar, and academia.

The Subcommittee on Civil and Constitutional Rights began markup of the bill on March 21, 1977. Mark-up continued for 22 days, spread over eight weeks. The Members of the Subcommittee examined and discussed every one of the over 300 sections of the bill during its forty-two hours of mark-up, in addition to its debate on the bill as a whole. Over 120 amendments were proposed and debated. Over 100 were adopted. The Subcommittee completed its work on the bill on May 16, 1977, when it reported the bill favorably by a roll call vote of 7-0. The bill as amended, with numerous additional technical, drafting, and style corrections, was ordered introduced as a clean bill. Chairman Edwards, joined by the other Members of the Subcommittee, introduced H.R.8200 on July 11, 1977.

The Committee on the Judiciary began deliberations on the bill on July 14, 1977, and continued work on July 15, and July 19. On July 19, the bill was ordered reported by a roll call vote of 26-3 with one Member voting present.

On July 19, the Committee was informed of a potential jurisdictional conflict with the Ways and Means Committee over certain tax provisions in the bill. The Chairmen of the two Committees met to reach an agreement on the proper disposition of the potential claim of jurisdiction asserted by the Ways and Means Committee. Under the agreement, the Ways and Means Committee would not request a sequential referral of the bill if the Judiciary Committee made the four special tax provisions contained in the bankruptcy code proposed by the bill inapplicable to Federal taxes.

On September 8, the Committee on the Judiciary met to consider the proposal. The Committee voted to reconsider the vote to report H.R.8200, adopted the amendment in the nature of a substitute, and once again ordered the bill reported favorably, by a roll call vote of 23-8." House Report No. 95-595, pp.1-2, fns. omitted.

8) "In bankruptcy, specialization is necessary to the functioning of the system. New bankruptcy judges, unfamiliar

with bankruptcy administration, take longer to decide matters and are less able to move cases, especially major business reorganizations, at the pace at which they must proceed in order to succeed. In large districts, where there is adequate judicial manpower, new bankruptcy judges are generally assigned simple cases until they become familiar with bankruptcy procedure.

The reason that the bankruptcy court system works as well as it does today is because the trial judges are specialists, experienced in handling the problems that arise. They are experienced because they handle exclusively bankruptcy cases. The statutory requirement of automatic reference of bankruptcy cases was enacted because the Judicial Conference requested Congress to recognize that the bankruptcy court is specialized, and that a generalist court is unable to make the bankruptcy system work as well as it does." House Report No. 95-595, pp.19-20, fns. omitted.

9) a) "The bankruptcy court's general jurisdiction and broad judicial powers make it a true court, unlike specialized administrative tribunals. To the extent that it is a specialized forum, its specialization is unlike that of the Tax Court, where primarily issues under the Internal Revenue Code are decided; or of the Customs Court, or Court of Customs and Patent Appeals, where the range of issues is similarly limited. The nature of the work of the bankruptcy court militates strongly toward its establishment under Article III, because the bankruptcy law itself and the jurisdiction the court must exercise are of national applicability." House Report No. 95-595, p.32, fns. omitted.

b) "The bankruptcy judge must apply to the many diverse and frequently complex fact patterns that arise in the typical bankruptcy case this general body of law, as well as apply the bankruptcy law:

> The variety of legal issues encountered is almost endless. The Bankruptcy Act requires application of the broadest spectrum of other laws governing, for example, taxes, torts, negotiable instruments, contracts, spendthrift and other trusts, mortgages, conveyances, landlord and tenant relationships, partnerships, mining, oil and gas extraction, domestic relations, labor relations, insurance, Securities and Exchange Commission statutes, regulations and decisional law * * *
>
> [In one recent bankruptcy case, In re Fotochrome,] the bankruptcy judge was called upon to decide an international conflict of law question involving sections of the Japanese

> Civil Code; to construe certain treaties of commerce and navigation, and to give effect to a postpetition award by the International Arbitration Tribunal.

Bankruptcy courts are frequently confronted with constitutional issues. Much of the decisional law surrounding the requirement of the fifth amendment with respect to property rights derives from bankruptcy cases. The courts have also considered issues such as State sovereignty and federalism; first amendment rights; the scope of the contracts clause; the jurisdiction and powers of Federal courts; and legitimacy of congressional grants of jurisdiction, to name only a few that have arisen. The issues resolved at the trial level in the bankruptcy court system are myriad ..." House Report No. 95-595, p.10, fns. omitted.

10) "The district courts are generally overburdened. Their caseload has increased dramatically in recent years without a corresponding increase in the number of judges. Though a judgeship bill is presently pending in both Houses of Congress, the increased number of district judges proposed in those bills probably would be inadequate to absorb the bankruptcy caseload.

Secondly, the Speedy Trial Act requires that criminal matters be given precedence on the district court calendars. The Constitution does not require a "speedy trial" for bankruptcy matters as it does for criminal cases. Thus, criminal matters would continue to be accorded priority. However, the nature of bankruptcy is such that it, too, for practical reasons, requires expeditious disposition. The original Bankruptcy Act in 1898 left many matters to the State courts for disposition because often they were speedier forums than the bankruptcy courts. Today, however, the State courts are seriously overburdened, although the bankruptcy courts are nearly current with their dockets.

Such delays as there are in bankruptcy cases often result from the need for a matter to proceed to decision in a State court. H.R. 7330 does much to alleviate the problem, but the change proposed would be to little avail if bankruptcy disputes were required to fight the judicial logjam caused by the Speedy Trial Act and by the volume of litigation pending in district courts. Assets would deteriorate; creditors would be delayed in recovering money to which they are justly entitled; and to use the familiar medical metaphor, in business reorganization cases, the patient would die on the operating table while diagnosis slowly proceeded." House Report No. 95-595, p.14, fns. omitted.

11) On July 14, 1982 there were 241 bankruptcy judges serving (222 full-time; 19 part-time).

12) On December 31, 1981 there were 685,320 pending bankruptcy estates. Interestingly, there were 383,481 terminations in calendar 1981 but 523,825 filings. Additionally there were 115,894 adversary proceedings filed. Judicial Workload Statistics (ended Dec. 31, 1981) p.27-28, prepared by Administrative Office of U. S. Courts, Wash., D. C.

13) Ibid.

14) In compliance with the Transition Study Mandate required of the Director of the Administrative Office of U. S. Courts [Sec. 406(a)(1)(A) and (B), Public Law 95-598] said Director recommended that some 300 bankruptcy judges should be appointed on April 1, 1984 at transition's close. [Memorandum to the Chief Justice and Members of the Judicial Conference of the United States, and the Judicial Councils of Circuits, dated April 23, 1982]. Significantly, such recommendation was based upon 1981 statistics which is not truly representative of current heavy filings.

15) "... As noted above, 'extreme specialization' is hardly an accurate description of bankruptcy courts designed to adjudicate the entire range of federal and state controversies. See infra, at 34-35. Moreover, the special nature of bankruptcy adjudications is in no sense incompatible with performance of such functions in a tribunal afforded the protection of Art. III. As one witness pointed out to Congress:

'Relevant to that question of need, it seems worth noting that Article III itself permits much flexibility, so long as tenure during good behavior is granted, much room exists as regards other conditions. Thus it would certainly be possible to create a special bankruptcy court under Article III and there is no reason why the judges of that court would have to be paid the same salary as district judges or any other existing judges. It would also be permissible to provide that when a judge of that court retired pursuant to statute, a vacancy for new appointment would not automatically be created. And it would be entirely valid to specify that the judges of that court could not be assigned to sit, even temporarily, on the general district courts or courts of appeals.' Hearings on H.R.31 and H.R.32 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 94th Cong., 2d Sess., 2697 (letter of Paul Mishkin)." Marathon, supra, fn. 28, pp.24-25.

16) "The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behavior, and shall, at states times, receive for their Services, a compensation, which shall not be diminished during their continuance in office." Art. III, §1, U. S. Constitution. Read in particular Marathon, plurality opinion, pp.8-9.

17) May "good politics" in making these appointments include the studied, serious consideration of qualified, experienced incumbents.

18) This would guarantee that these newly created Art. III judges could not and would not exercise judicial authority in criminal matters, social issues and other politically controversial areas.

19) This is a conservative estimate. In fiscal 1980 there were 360,960 filings, 45,841 business in character. From 1976 through 1980 business filings were at a low percentage of 12.8% to a high percentage of 15% in 1977 and 1978, measured against total filings. Thus 12.8% of 685,320 pending cases would indicate business cases of 87,720. Compare this with Dun & Bradstreet, Inc. which "reported the business failure rate for the week ended June 25, 1982 declined over 18 percent to 448 from the previous week's record 548 closings. This compared with only 349 failures reported the same week last year the service said. The 11,426 reported closings so far this year are over 45 percent ahead of the 7,943 reported for the same 1981 period. Last year a total of 17,040 businesses closed their doors for the last time, D & B said." The Journal Record, Oklahoma City, June 30, 1982, p.2.

20) "... The number of people and dollar amounts involved in bankruptcy cases are staggering. As of October 1976, there were pending in the bankruptcy courts 250,000 cases, involving 250,000 debtors. In those cases, there were over 9 million scheduled creditors; over $27 billion in scheduled assets; and nearly $43 billion in scheduled liabilities. Bankruptcy judges deal daily with issues that involve millions of dollars, and frequently dozens or hundreds of jobs of employees of struggling companies." House Report No. 95-595, p.11. The above figures have been dwarfed by the subsequent increased number of filings and expanded court jurisdiction.

21) Read "An Overview of the Bankruptcy Reform Act of 1978" (Patrick and Meyer), 1 B.R. 1.

22) Apart from other factors, the explosive increase in energy cost since 1973 and the increased cost of money at unprecedented highs, has created an entirely alien business environment.

23) Farm leaders from Texas, Oklahoma, Missouri, Arkansas and Kansas "anticipate 25,000 to 70,000 of the region's estimated farmers will go under by the fall of next year." The Journal Record, Okla. City, April 14, 1982, p.1. "Texas leads the nation in the number of delinquent loan accounts -- almost 10,000 -- held by the federal Farmers Home Administration...." Supra, p.1.

24) Marathon, plurality opinion, p.38.

25) Fn. 19, supra, p.3, fn. 2.

26) The judicial system generally, state and federal, is being overburdened by a litigious society. Sensible compromise where feasible is essential. Such is doubly true in bankruptcy court matters where both matters of law and practical business impact are in view. Almost any prompt reasonable resolution is preferable to delay.

EXPLANATION OF JUDGES' PROPOSALS

Proposal A

Proposal A assumes that if the bankruptcy court is established as an Article III court effective April 1, 1984, the decision of the Supreme Court in the Northern Pipeline Co. v. Marathon Pipeline case is mooted. Permitting the bankruptcy court to exercise full jurisdiction during the remainder of the transition period does not pose a threat to the independence of the judiciary.

We propose that commencing April 1, 1984, bankruptcy judges be appointed by the President, by and with the advice and consent of the Senate, to hold office during good behavior.

Based on recommendations of the Administrative Office of the United States Courts, our bill provides for 308 bankruptcy judgeship positions, of which 230 are classified as permanent positions and 78 are classified as temporary positions. Some positions are temporary only in the sense that vacancies occurring more than five years after March 31, 1984 in a district allotted one or more temporary positions would not be filled unless the number of judges in service in the district is less than the number of permanent positions authorized.

We propose that a bankruptcy judge receive a salary equal to 95% of the salary of a United States district judge. Because the salary of district judges cannot be diminished, it would follow that the salary of the bankruptcy judges likewise could not be diminished.

Bankruptcy judges are not authorized to sit on the district court or court of appeals.

We propose that appeals from the bankruptcy court be routed through the district court as they are presently and that the option of permitting the chief judge of the circuit to appoint panels of bankruptcy judges to consider such appeals be retained.

Bankruptcy judges would be eligible to participate in the Judicial Survivors Annunity Fund. The judicial retirement system for bankruptcy judges is less generous than that provided for district judges and less costly because it does not provide for senior status.

We propose that the expanded jurisdiction of the bankruptcy court remain intact as the only reasonable and feasible solution to the expeditious handling of controversies arising in or related to bankruptcy cases.

Proposal B

In the event it is determined that under the mandate of the Supreme Court the bankruptcy court must be reconstituted as an Article III court prior to October 4, 1984, in order to continue to function effectively, then we propose that the present court, with its enhanced jurisdiction, be continued in effect and that incumbent judges be continued in office during good behavior.

Under prior law, the United States district court functioned as two courts in one. It was the United States district court and was also the court of bankruptcy for the district. Section 404(a) of the Bankruptcy Reform Act continued in existence the courts of bankruptcy as they existed on September 30, 1978 and provided that such courts should operate as a separate department of the district court during the transition period. Also during the transition period, the jurisdiction and powers of the court of bankruptcy were enlarged to include all the powers of the separate court of bankruptcy which was to come into existence on April 1, 1984. The bankruptcy judges propose that the court of bankruptcy, with its enlarged powers, by continued in existence beyond the end of the transition period on March 31, 1984 and that the court be renamed the United States bankruptcy court for the district.

We take the position that continuation of the existence of the transition court will make it possible to fold in incumbent judges simply by continuing them in office during good behavior. Incumbent bankruptcy judges were appointed as judges of the bankruptcy court by a court of law, which is one of the permissible means of appointment under Article 2, §2, clause 2 of the Constitution, so that continuation of the appointments during good behavior would not be tatamount to an appointment by Congress and, therefore, would not conflict with the ruling of the Supreme Court in Buckley v. Valeo, 424 U.S. 1, 120-144 (1976).

The following bar associations and organizations have endorsed legislation to establish a judicial retirement system for bankruptcy judges:

American Bar Association
American Judicature Society
National Bankruptcy Conference
Commercial Law League of America
College of American Trial Lawyers

Kansas Bar Association
South Carolina Bar Association
Tennessee Bar Association
Illinois State Bar Association
Kentucky Bar Association
Ohio State Bar Association
Louisiana State Bar Association
Alaska Bar Association
Virginia Bar Association
Rhode Island Bar Association
The State Bar of South Dakota

Bar of the City of New York
The Chicago Bar Association
Westchester County Bar Association
The Atlanta Bar Association

97th Congress
2d Session

To provide for the appointment of United States bankruptcy judges under article III of the Constitution, and for other purposes.

IN THE SENATE OF THE UNITED STATES

A BILL

To provide for the appointment of United States bankruptcy judges under article III of the Constitution, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

Section 1. This Act may be cited as the "Bankruptcy Court Act of 1982".

AMENDMENTS TO TITLE 28 OF THE UNITED STATES CODE

Sec. 2(a) Chapter 6 of Title 28, United States Code, as enacted by section 201(a) of the Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2657), is amended to read as follows:

"Chapter 6 - Bankruptcy Courts

"Sec.
"151. Creation and composition of bankruptcy courts.
"152. Appointment of bankruptcy judges.
"153. Tenure and residence of bankruptcy judges.
"154. Salaries of bankruptcy judges.
"155. Chief judge; precedence of bankruptcy judges.
"156. Division of business among bankruptcy judges.
"157. Times of holding court.
"158. Accommodations at places of holding court.
"159. Vacant judgeship as affecting proceedings.
"160. Adjournment.
"161. Special sessions; places; notice.
"162. Bias or prejudice of judge.
"163. Appellate panels.

"§151. Creation and composition of bankruptcy courts

"(a) There shall be in each judicial district a bankruptcy court which shall be a court of record known as the United States Bankruptcy Court for the district.

"(b) Each bankruptcy court shall consist of the bankruptcy judge or judges for the district in regular active service. Justices or judges designated and assigned shall be competent to sit as judges of the bankruptcy court.

"(c) Except as otherwise provided by law, or rule or order of court, the judicial power of a bankruptcy court with respect to any action, suit or proceeding may be exercised by a single bankruptcy judge, who may preside alone and hold a regular or special session of court at the same time other sessions are held by other bankruptcy judges.

"§152. Appointment of bankruptcy judges

"Except as hereinafter provided in this subsection, the President shall appoint, by and with the advice and consent of the Senate, bankruptcy judges for the several judicial districts as follows:

Districts	Judges	
	Permanent	Temporary
Alabama		
Northern	4	2
Middle	2	
Southern	2	
Alaska	1	1
Arizona	4	
Arkansas: Eastern and Western	2	1
California		
Northern	7	3
Eastern	4	2
Central	12	4
Southern	3	1
Colorado	4	1
Connecticut	2	1
Delaware	1	
District of Columbia	1	
Florida		
Northern	1	
Middle	3	
Middle and Northern		1
Southern	3	

Districts	Judges	
	Permanent	Temporary
Georgia		
Northern	4	4
Middle	2	
Southern	1	1
Hawaii	1	1
Idaho	1	1
Illinois		
Northern	8	6
Central	2	1
Southern	1	
Indiana		
Northern	2	1
Southern	4	1
Iowa		
Northern	1	1
Southern	1	1
Kansas	3	1
Kentucky		
Eastern	1	1
Western	2	1
Louisiana		
Eastern	2	
Middle; Eastern and Western	1	
Western	2	

Districts	Judges	
	Permanent	Temporary
Maine	2	
Maryland	2	2
Massachusetts	4	1
Michigan		
Eastern	4	2
Western	2	2
Minnesota	4	1
Mississippi		
Northern	1	
Southern	2	
Missouri		
Eastern	3	
Western	3	1
Montana	1	
Nebraska	1	1
Nevada	2	1
New Hampshire	1	
New Jersey	5	3
New Mexico	2	
New York		
Northern	2	1
Southern	7	
Eastern	6	1
Western	3	1

Districts	Judges	
	Permanent	Temporary
North Carolina		
Eastern	2	1
Western	1	1
Middle	2	
North Dakota	1	
Ohio		
Northern	8	1
Southern	7	1
Oklahoma		
Northern	1	
Eastern and Northern	1	
Western	2	
Oregon	4	1
Pennsylvania		
Eastern	3	
Middle	2	
Western	3	1
Puerto Rico and Virgin Islands	2	
Rhode Island	1	
South Carolina	1	1
South Dakota	1	
Tennessee		
Eastern	2	1
Middle	2	1
Western	2	1

Districts	Judges	
	Permanent	Temporary
Texas		
Northern	3	2
Southern	3	2
Eastern and Northern	1	
Western	2	1
Utah	2	1
Vermont	1	
Virginia		
Eastern	3	1
Western	2	1
Eastern and Western		1
Washington		
Eastern	1	2
Western	4	1
West Virginia		
Northern	1	
Northern and Southern		1
Southern	1	
Wisconsin		
Eastern	3	
Western	2	
Wyoming	1	

After five years after March 31, 1984, any vacancy occurring in the office of bankruptcy judge in a district hereinabove allotted one or more temporary judgeship positions shall not be filled unless the number of judges serving in the district is less than the number of permanent judges hereinabove authorized for such district.

"§153. Tenure and residence of bankruptcy judges

"(a) The bankruptcy judges shall hold office during good behavior.

"(b) Except as provided in subsection (c) of this section, each bankruptcy judge shall reside in the district or one of the districts for which he is appointed.

"(c) The bankruptcy judge for the District of Columbia shall reside within 20 miles of such judge's official station.

"154. Salaries of bankruptcy judges

"Each bankruptcy judge shall receive a salary equal to ninety-five per cent of the salary as may from time to time be in effect for a judge of a district court of the United States other than the chief judge of the United States District Court for the District of Columbia.

"§155. Chief judge; precedence of bankruptcy judges

"(a) In each district having more than one judge the bankruptcy judge in regular active service who is senior in commission and under seventy years of age shall be the chief judge of the bankruptcy court. If all the bankruptcy judges in regular active service are 70 years of age or older the youngest shall act as chief judge until a judge has been appointed and qualified who is under 70 years of age, but a judge may not act as chief judge until he has served as a bankruptcy judge for one year.

"(b) The chief judge shall have precedence and preside at any session which he attends.

"Other bankruptcy judges shall have precedence and preside according to the seniority of their commissions. Judges whose commissions bear the same date shall have precedence according to seniority in age.

"(c) A judge whose commission extends over more than one district shall be junior to all bankruptcy judges except in the district in which he resided at the time he entered upon the duties of his office.

"(d) If the chief judge desires to be relieved of his duties as chief judge while retaining his active status as a bankruptcy judge, he may so certify to the Chief Justice of the United States and thereafter the bankruptcy judge in active service next in precedence and willing to serve shall be designated by the Chief Justice as the chief judge of the bankruptcy court.

"(e) If a chief judge is temporarily unable to perform his duties as such, they shall be performed by the bankruptcy judge in active service, present in the district and able and qualified to act, who is next in precedence.

"(f) Service as a referee in bankruptcy or as a bankruptcy judge under the Bankruptcy Act, as well as service under the Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2683), shall be taken into account in the determination of seniority of commission under this section.

"§156. Division of business among bankruptcy judges

"The business of a bankruptcy court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.

"The chief judge of the bankruptcy court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.

"If the bankruptcy judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.

"§157. Times for holding regular sessions

"The times for commencing regular sessions of the bankruptcy court for transacting judicial business at the places fixed by this chapter and chapter 5 of this title shall be determined by the rules or orders of the bankruptcy court. Such rules or orders may provide that at one or more of such places the court shall be in continuous session for such purposes on all business days throughout the year. At other places a session of the court shall continue for such purposes until terminated by order of final adjournment or by commencement of the next regular session at the same place.

"§158. Accommodations at places for holding court

"Court shall be held only at places where Federal quarters and accommodations are available, or suitable quarters and accommodations are furnished without cost to the United States. The foregoing restrictions shall not, however, preclude the Administrator of General Services, at the request of the Director of the Administrative Office of the United States Courts, from providing such court quarters and accommodations as the Administrator determines can appropriately be made available at places where court is authorized by law to be held, but only if such court quarters and accommodations have been approved as necessary by the judicial council of the appropriate circuit.

"§159. Vacant judgeship as affecting proceedings

"When the office of a bankruptcy judge becomes vacant, all pending process, pleadings and proceedings shall, when necessary, be continued by the clerk until a judge is appointed or designated to hold such court.

"§160. Adjournment

"(a) Any bankruptcy court may, by order made anywhere within its district, adjourn or, with the consent of the judicial council of the circuit, pretermit any regular session of court for insufficient business or other good cause.

"(b) If the judge of a bankruptcy court is unable to attend and unable to make an order of adjournment, the clerk may adjourn the court to the next regular session or to any earlier date which he may determine.

"§161. Special sessions; places; notice

"Special sessions of the bankruptcy court may be held at such places in the district as the nature of the business may require, and upon such notice as the court orders.

"Any business may be transacted at a special session which might be transacted at a regular session.

"§162. Bias or prejudice of judge

"Whenever a party to any proceeding in a bankruptcy court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the proceeding is to be heard, or good cause shall be shown for failure to file within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

"8163. Appellate panels

"(a) If the circuit council of a circuit orders application of this section to a district within such circuit, the chief judge of such circuit shall designate panels of three bankruptcy judges to hear appeals from judgments, orders, and decrees of the bankruptcy court of the United States for such district. Except as provided in section 293(e) of this title, a panel shall be composed only of bankruptcy judges for districts located in the circuit in which the appeal arises. The chief judge shall designate a sufficient number of such panels so that appeals may be heard and disposed of expeditiously.

"(b) A panel designated under subsection (a) of this section may not hear an appeal from a judgment, order, or decree entered by a member of the panel.

"(c) When hearing an appeal, a panel designated under subsection (a) of this section shall sit at a place convenient to the parties to the appeal.

(b) Section 371 of title 28, United States Code, is amended to add a new paragraph (c) as follows:

> "(c) Notwithstanding the preceeding provisions of this section, retirement of bankruptcy judges shall be governed by the provisions of section 377 of this title.

(c) Section 372 of title 28, United States Code, is amended to add a new paragraph (c) as follows:

> "(c) Notwithstanding the preceeding provisions of this section, retirement of bankruptcy judges shall be governed by the provisions of section 377 of this title.

(d) Section 376(a)(1) of title 28, United States Code, is amended -

(1) by redesignating subparagraphs (C), (D), and (E) as subparagraphs (D), (E), and (F), respectively,

(2) by inserting after subparagraph (B) the following new subparagraph:

"(C) a bankruptcy judge holding office on the date of enactment of the Bankruptcy Court Act of 1982;"

(3) by striking out "or" before "(iii)", and

(4) by inserting before the semicolon at the end thereof ", or (iv) in the case of a bankruptcy judge holding office on the date of enactment of the Bankruptcy Court Act of 1982, the date of the enactment of such Act.

(e) Section 376(a)(2) of title 28, United States Code, is amended -

(1) in subparagraph (A) -

(A) by striking out "or (ii)" and inserting in lieu thereof "(ii)", and

(B) by inserting ", or (iii) after retirement from office under section 377 of this title" before the semicolon,

(2) by redesignating subparagraphs (C), (D), and (E) as subparagraphs (D), (E), and (F), respectively, and

(3) by inserting after subparagraph (B) the following new subparagraph:

"(C) in the case of a bankruptcy judge holding office on the date of enactment of the Bankruptcy Court Act of 1982, retirement pay received after retirement from office under section 377;".

(f) The Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2549), is amended by striking out section 211.

(g) Chapter 17 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"8377. Bankruptcy Judges

"(a)(1) Any bankruptcy judge may retire after attaining the age of seventy years and after serving as a bankruptcy judge for at least ten years.

"(2) Any bankruptcy judge may retire after attaining the age of sixty-five years and after serving as a bankruptcy judge for at least fifteen years.

"(3) Any bankruptcy judge who becomes permanently disabled from performing the duties of the office shall retire.

"(4) Any bankruptcy judge holding office on the date of enactment of the Bankruptcy Court Act of 1982 who is not reappointed after March 31, 1984, may retire, if such judge -

"(A) continues in service until March 31, 1984, or after such date until such judge's successor takes office;

"(B) advises the President in writing that such judge is willing to accept reappointment to the bankruptcy court, not earlier than nine months preceding March 31, 1984 and not later than six months preceding such date, and

"(C)(i) attains the age of sixty years, or

"(ii) attains the age of fifty-five years and serves at least ten years in the aggregate as a bankruptcy judge.

"(b)(1) A bankruptcy judge who elects under subsection (c) of this section to receive retirement pay under this subsection and who retires under paragraph (1), (2) or (4) of subsection (a) of this section shall receive retirement pay for any period at a rate equal to the product of -

"(A) the salary payable to a bankruptcy judge for such period, and

"(B) the sum of -

"(i) the number of years the bankruptcy judge who so elects serves as a bankruptcy judge before October 1, 1979, divided by 30, and

"(ii) the number of years the bankruptcy judge who so elects serves as a bankruptcy judge after September 30, 1979, divided by 15,

except that the rate of such retirement pay shall not exceed the salary payable to a bankruptcy judge for such period.

"(2) A bankruptcy judge who elects under subsection (c) of this section to receive retirement pay under this subsection and who retires under subsection (a)(3) of this section shall receive retirement pay for any period at a rate -

"(A) equal to the rate of the salary payable to a bankruptcy judge for such period if before such retirement the bankruptcy judge who so elects serves as a bankruptcy judge not less than ten years, or

"(B) equal to 50 per centum of the rate of the salary payable to a bankruptcy judge for such period if before such retirement the bankruptcy judge who so elects serves as a bankruptcy judge less than ten years.

"(3)(A) Such retirement pay shall begin to accrue on the day following the day on which such judge's salary as a bankruptcy judge ceases to accrue, and shall continue to accrue during the remainder of the life of such judge.

"(B) Retirement pay under this section shall be paid in the same manner as the salary of a bankruptcy judge.

"(4) In computing the rate of retirement pay under this subsection, that portion of the aggregate number of years of service which is a fractional part of one year shall be eliminated if it is less than six months, or shall be counted as a full year if such part equals or exceeds six months.

"(c)(1) A bankruptcy judge may elect to receive retirement pay under subsection (b) of this section by filing notice of such election in writing with the Director of the Administrative Office of the United States Courts. The Director shall transmit to the Office of Personnel Management a copy of each notice filed under this paragraph.

"(2) Such election may be made by a bankruptcy judge only during such judge's term of office or on the day on which such judge's successor takes office.

"(d) In the case of any bankruptcy judge who files an election pursuant to subsection (c) of this section to receive retirement pay under subsection (b) of this section -

"(1) no annuity or other payment, except as provided in paragraph (3) of this subsection, shall be payable to such judge under the civil service retirement laws with respect to any service performed by such judge (whether performed before or after such election is filed and whether performed as a bankruptcy judge or otherwise),

"(2) no deduction for purposes of the Civil Service Retirement and Disability Fund shall be made from retirement pay payable to such judge under subsection (b) of this section or from any other salary, pay, or compensation payable to such judge, for any period during which such election is in effect, and

"(3) such judge shall be paid the lump-sum credit computed under section 8331(8) of title 5 of the United States Code upon making application therefor with the Office of Personnel Management.

"(e) A bankruptcy judge who desires to retire under subsection (a)(3) of this section shall furnish to the President a certificate of disability signed by the chief judge of the circuit in which such bankruptcy judge is serving.

"(f)(1) A bankruptcy judge who files an election under subsection (c) of this section to receive retired pay under subsection (b) of this section may revoke such election at any time before the first day on which retirement pay would begin to accrue with respect to such judge but for such revocation.

"(2) Any revocation under this subsection of an election shall be made by filing notice of such revocation with the Office of Personnel Management. The Office of Personnel Management shall transmit to the Director of the Administrative Office of the United States Courts a copy of each notice filed under this paragraph.

"(3) In the case of a bankruptcy judge who revokes under this subsection an election made under subsection (c) of this section -

"(A) for purposes of this section, such judge shall be treated as not having filed such election, and

"(B) for purposes of section 376 of this title -

"(i) such judge shall be treated as not having filed an election under subsection (a)(1) of such section,

"(ii) subsection (g) of such section shall not apply with respect to such judge, and the amount credited to such judge's account under subsection (e) of such section, together with interest at 4 per centum per annum to December 31, 1947, and 3 per centum per annum thereafter, compounded on December 31, of each year to the date on which the revocation is filed, shall be returned to such judge, and

"(C)(i) for purposes of the civil service retirement laws, no credit shall be allowed for service as a bankruptcy judge unless with respect to such service such judge deposits in the Civil Service Retirement and Disability Fund the amount required by the civil service retirement laws, and

"(ii) if such judge deposits the amount so required, then the Administrative Office of the United States Courts shall deposit in the Civil Service Retirement and Disability Fund an amount equal to the amount it would have contributed to such Fund but for the effectiveness of the election made by such judge under subsection (c) of this section to receive retirement pay under subsection (b) of this section. Upon such deposit, services as a bankruptcy judge shall be treated as service with respect to which deductions and contributions had been made during the period of such service.

"(g) Except as otherwise provided in this subsection, the provisions of the civil service retirement laws, including the provisions relating to the deduction and withholding of amounts from basic pay, salary, and compensation, shall apply with respect to service as a bankruptcy judge, together with other service as an officer or employee to whom such civil service retirement laws apply, as if this section had not been enacted.

"(h) Subparagraphs (i) and (ii) of section 8331(1) of title 5, United States Code, shall not apply with repsect to a bankruptcy judge continued in office by section 404(b) of the Act of November 6, 1978 (Public Law 950598; 92 Stat. 2683), for any period during which there is not in effect an election made by such judge under subsection (c) of this section to receive retirement pay under subsection (b) of this section.

(h) The table of sections for chapter 17 of title 28, United States Code, is amended by adding at the end thereof the following new item:

"377. Bankruptcy judges.".

(i) Section 451 of title 28, United States Code, as amended by section 213 of the Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2661), is amended -

(1) in the first paragraph -

(A) by inserting ", bankruptcy courts constituted under chapter 6 of this title" after "chapter 5 of this title", and

(B) by striking out "and bankruptcy courts, the judges of which are entitled to hold office for a term of 14 years", and

(2) in the third paragraph -

(A) by inserting "bankruptcy courts," after "district courts,", and

(B) by striking out "and bankruptcy courts, the jduges of which are entitled to hold office for a term of 14 years".

(j) Section 1293 of title 28, United States Code, is amended -

(1) in subsection (a) by striking out "160(a)" and inserting in lieu thereof "163(a)", and

(2) in subsection (b) by striking out "160" and inserting in lieu thereof "163".

(k) Section 1334(a) of title 28, United States Code, is amended by striking out "160" and inserting in lieu thereof "163".

(l) Section 1471 of title 28, United States Code, as enacted by the Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2668), is amended to read as follows:

§1471. Jurisdiction

"(a) Except as provided in subsection (b) of this section, the bankruptcy courts shall have original and exclusive jurisdiction of all cases under title 11.

"(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the bankruptcy courts, the bankruptcy courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

"(c) Subsection (b) of this section does not prevent a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or decision not to abstain, is not reviewable by appeal or otherwise.

"(d) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all the property, wherever located, of the debtor, as of the commencement of such case.

(m) For purposes of this section, the term 'bankruptcy judge' means, unless specified otherwise, a referee in bankruptcy or bankruptcy judge holding office on the date of enactment of this Act or a United States bankruptcy judge.

EFFECTIVE DATE

Sec. 3.(a) Except as provided in subsection (b), this Act shall take effect on the date of the enactment of this Act.

(b) The amendments made by section 2 shall take effect on April 1, 1984.

97th Congress
2d Session

To provide for the appointment of United States bankruptcy judges under article III of the Constitution, and for other purposes.

IN THE SENATE OF THE UNITED STATES

A BILL

To provide for the appointment of United States bankruptcy judges under article III of the Constitution, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

Section 1. This Act may be cited as the "Bankruptcy Court Act of 1982".

AMENDMENTS TO TITLE 28 OF THE UNITED STATES CODE

Sec. 2(a) Chapter 6 of Title 28, United States Code, as enacted by section 201(a) of the Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2657), is amended to read as follows:

"Chapter 6 - Bankruptcy Courts

"Sec.
"151. Continuation and composition of bankruptcy courts.
"152. Appointment of bankruptcy judges.
"153. Tenure and residence of bankruptcy judges.
"154. Salaries of bankruptcy judges.
"155. Chief judge; precedence of bankruptcy judges.
"156. Division of business among bankruptcy judges.
"157. Times of holding court.
"158. Accommodations at places of holding court.
"159. Vacant judgeship as affecting proceedings.
"160. Adjournment.
"161. Special sessions; places; notice.
"162. Bias or prejudice of judge.
"163. Appellate panels.

"§151. Continuation and composition of bankruptcy courts

"(a) The courts of bankruptcy continued in existence by section 404(a) of the Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2683) and by such Act constituted as a separate department of the district court and invested with the jurisdiction and powers enumerated in Title II of such Act shall continue beyond March 31, 1984 as courts of record, and shall be known as the United States Bankruptcy Court for the district.

"(b) Each bankruptcy court shall consist of the bankruptcy judge or judges for the district in regular active service. Justices or judges designated and assigned shall be competent to sit as judges of the bankruptcy court.

"(c) Except as otherwise provided by law, or rule or order of court, the judicial power of a bankruptcy court with respect to any action, suit or proceeding may be exercised by a single bankruptcy judge, who may preside alone and hold a regular or special session of court at the same time other sessions are held by other bankruptcy judges.

"§152. Appointment of bankruptcy judges

"(a) Except as hereinafter provided in this subsection and subject to the provisions of subsection (b) of this section, the President shall appoint, by and with the advice and consent of the Senate, bankruptcy judges for the several judicial districts as follows:

Districts	Judges	
	Permanent	Temporary
Alabama		
Northern	4	2
Middle	2	
Southern	2	
Alaska	1	1
Arizona	4	
Arkansas: Eastern and Western	2	1
California		
Northern	7	3
Eastern	4	2
Central	12	4
Southern	3	1
Colorado	4	1
Connecticut	2	1
Delaware	1	
District of Columbia	1	
Florida		
Northern	1	
Middle	3	
Middle and Northern		1
Southern	3	

Districts	Judges	
	Permanent	Temporary
Georgia		
Northern	4	4
Middle	2	
Southern	1	1
Hawaii	1	1
Idaho	1	1
Illinois		
Northern	8	6
Central	2	1
Southern	1	
Indiana		
Northern	2	1
Southern	4	1
Iowa		
Northern	1	1
Southern	1	1
Kansas	3	1
Kentucky		
Eastern	1	1
Western	2	1
Louisiana		
Eastern	2	
Middle; Eastern and Western	1	
Western	2	

Districts	Judges	
	Permanent	Temporary
Maine	2	
Maryland	2	2
Massachusetts	4	1
Michigan		
Eastern	4	2
Western	2	2
Minnesota	4	1
Mississippi		
Northern	1	
Southern	2	
Missouri		
Eastern	3	
Western	3	1
Montana	1	
Nebraska	1	1
Nevada	2	1
New Hampshire	1	
New Jersey	5	3
New Mexico	2	
New York		
Northern	2	1
Southern	7	
Eastern	6	1
Western	3	1

Districts	Judges	
	Permanent	Temporary
North Carolina		
Eastern	2	1
Western	1	1
Middle	2	
North Dakota	1	
Ohio		
Northern	8	1
Southern	7	1
Oklahoma		
Northern	1	
Eastern and Northern	1	
Western	2	
Oregon	4	1
Pennsylvania		
Eastern	3	
Middle	2	
Western	3	1
Puerto Rico and Virgin Islands	2	
Rhode Island	1	
South Carolina	1	1
South Dakota	1	
Tennessee		
Eastern	2	1
Middle	2	1
Western	2	1

Districts	Judges	
	Permanent	Temporary
Texas		
Northern	3	2
Southern	3	2
Eastern and Northern	1	
Western	2	1
Utah	2	1
Vermont	1	
Virginia		
Eastern	3	1
Western	2	1
Eastern and Western		1
Washington		
Eastern	1	2
Western	4	1
West Virginia		
Northern	1	
Northern and Southern		1
Southern	1	
Wisconsin		
Eastern	3	
Western	2	
Wyoming	1	

After five years from the date of enactment of this Act, any vacancy occurring in the office of bankruptcy judge in a district hereinabove allotted one or more temporary judgeship positions shall not be filled unless the number of judges serving in the district is less than the number of permanent judges hereinabove authorized for such district.

"(b) Congress finds that the orderly administration of the bankruptcy laws of the United States will be jeopardized unless Congress acts promptly to perpetuate the existing courts of bankruptcy as courts of record under Article III of the Constitution of the United States. To permit disruption of the administration of the bankruptcy laws would be contrary to the public interest and the rights of debtors and creditors alike. Congress finds that the bankruptcy judges holding office on the date of enactment of this Act were duly appointed by a court of law, in conformity with Article II, §2, clause 2 of the Constitution of the United States, as judges of the courts of bankruptcy continued in existence by this Act. Accordingly, all bankruptcy judges holding office on the date of enactment of this Act are continued in office as judges of the United States Bankruptcy Court for their respective districts and shall hold office during good behavior.

"§153. Tenure and residence of bankruptcy judges

"(a) The bankruptcy judges shall hold office during good behavior.

"(b) Except as provided in subsection (c) of this section, each bankruptcy judge shall reside in the district or one of the districts for which he is appointed.

"(c) The bankruptcy judge for the District of Columbia shall reside within 20 miles of such judge's official station.

"154. Salaries of bankruptcy judges

"Each bankruptcy judge shall receive a salary equal to ninety-five per cent of the salary as may from time to time be in effect for a judge of a district court of the United States other than the chief judge of the United States District Court for the District of Columbia.

"§155. Chief judge; precedence of bankruptcy judges

"(a) In each district having more than one judge the bankruptcy judge in regular active service who is senior in commission and under seventy years of age shall be the chief judge of the bankruptcy court. If all the bankruptcy judges in regular active service are 70 years of age or older the youngest shall act as chief judge until a judge has been appointed and qualified who is under 70 years of age, but a judge may not act as chief judge until he has served as a bankruptcy judge for one year.

"(b) The chief judge shall have precedence and preside at any session which he attends.

"Other bankruptcy judges shall have precedence and preside according to the seniority of their commissions. Judges whose commissions bear the same date shall have precedence according to seniority in age.

"(c) A judge whose commission extends over more than one district shall be junior to all bankruptcy judges except in the district in which he resided at the time he entered upon the duties of his office.

"(d) If the chief judge desires to be relieved of his duties as chief judge while retaining his active status as a bankruptcy judge, he may so certify to the Chief Justice of the United States and thereafter the bankruptcy judge in active service next in precedence and willing to serve shall be designated by the Chief Justice as the chief judge of the bankruptcy court.

"(e) If a chief judge is temporarily unable to perform his duties as such, they shall be performed by the bankruptcy judge in active service, present in the district and able and qualified to act, who is next in precedence.

"(f) Service as a referee in bankruptcy or as a bankruptcy judge under the Bankruptcy Act, as well as service under the Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2683), shall be taken into account in the determination of seniority of commission under this section.

"§156. Division of business among bankruptcy judges

"The business of a bankruptcy court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.

"The chief judge of the bankruptcy court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.

"If the bankruptcy judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.

"§157. Times for holding regular sessions

"The times for commencing regular sessions of the bankruptcy court for transacting judicial business at the places fixed by this chapter and chapter 5 of this title shall be determined by the rules or orders of the bankruptcy court. Such rules or orders may provide that at one or more of such places the court shall be in continuous session for such purposes on all business days throughout the year. At other places a session of the court shall continue for such purposes until terminated by order of final adjournment or by commencement of the next regular session at the same place.

"§158. Accommodations at places for holding court

"Court shall be held only at places where Federal quarters and accommodations are available, or suitable quarters and accommodations are furnished without cost to the United States. The foregoing restrictions shall not, however, preclude the Administrator of General Services, at the request of the Director of the Administrative Office of the United States Courts, from providing such court quarters and accommodations as the Administrator determines can appropriately be made available at places where court is authorized by law to be held, but only if such court quarters and accommodations have been approved as necessary by the judicial council of the appropriate circuit.

"§159. Vacant judgeship as affecting proceedings

"When the office of a bankruptcy judge becomes vacant, all pending process, pleadings and proceedings shall, when necessary, be continued by the clerk until a judge is appointed or designated to hold such court.

"§160. Adjournment

"(a) Any bankruptcy court may, by order made anywhere within its district, adjourn or, with the consent of the judicial council of the circuit, pretermit any regular session of court for insufficient business or other good cause.

"(b) If the judge of a bankruptcy court is unable to attend and unable to make an order of adjournment, the clerk may adjourn the court to the next regular session or to any earlier date which he may determine.

"§161. Special sessions; places; notice

"Special sessions of the bankruptcy court may be held at such places in the district as the nature of the business may require, and upon such notice as the court orders.

"Any business may be transacted at a special session which might be transacted at a regular session.

"§162. Bias or prejudice of judge

"Whenever a party to any proceeding in a bankruptcy court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the proceeding is to be heard, or good cause shall be shown for failure to file within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

"§163. Appellate panels

"(a) If the circuit council of a circuit orders application of this section to a district within such circuit, the chief judge of such circuit shall designate panels of three bankruptcy judges to hear appeals from judgments, orders, and decrees of the bankruptcy court of the United States for such district. Except as provided in section 293(e) of this title, a panel shall be composed only of bankruptcy judges for districts located in the circuit in which the appeal arises. The chief judge shall designate a sufficient number of such panels so that appeals may be heard and disposed of expeditiously.

"(b) A panel designated under subsection (a) of this section may not hear an appeal from a judgment, order, or decree entered by a member of the panel.

"(c) When hearing an appeal, a panel designated under subsection (a) of this section shall sit at a place convenient to the parties to the appeal.

(b) Section 371 of title 28, United States Code, is amended to add a new paragraph (c) as follows:

"(c) Notwithstanding the preceeding provisions of this section, retirement of bankruptcy judges shall be governed by the provisions of section 377 of this title.

(c) Section 372 of title 28, United States Code, is amended to add a new paragraph (c) as follows:

"(c) Notwithstanding the preceeding provisions of this section, retirement of bankruptcy judges shall be governed by the provisions of section 377 of this title.

(d) Section 376(a)(1) of title 28, United States Code, is amended by inserting before the semicolon at the end thereof ", or (iv) in the case of a bankruptcy judge continued in office by the Bankruptcy Court Act of 1982, the date of enactment of such Act.

(e) Section 376(a)(2) of title 28, United States Code, is amended in subparagraph (A) -

(1) by striking out "or (ii)" and inserting in lieu thereof "(ii)", and

(2) by inserting ", or (iii) after retirement from office under section 377 of this title" before the semicolon.

(f) The Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2549), is amended by striking out section 211.

(g) Chapter 17 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§377. Bankruptcy Judges

"(a)(1) Any bankruptcy judge may retire after attaining the age of seventy years and after serving as a bankruptcy judge for at least ten years.

"(2) Any bankruptcy judge may retire after attaining the age of sixty-five years and after serving as a bankruptcy judge for at least fifteen years.

"(3) Any bankruptcy judge who becomes permanently disabled from performing the duties of the office shall retire.

"(b)(1) A bankruptcy judge who elects under subsection (c) of this section to receive retirement pay under this subsection and who retires under paragraph (1) or (2) of subsection (a) of this section shall receive retirement pay for any period at a rate equal to the product of -

"(A) the salary payable to a bankruptcy judge for such period, and

"(B) the sum of -

"(i) the number of years the bankruptcy judge who so elects serves as a bankruptcy judge before October 1, 1979, divided by 30, and

"(ii) the number of years the bankruptcy judge who so elects serves as a bankruptcy judge after September 30, 1979, divided by 15,

except that the rate of such retirement pay shall not exceed the salary payable to a bankruptcy judge for such period.

"(2) A bankruptcy judge who elects under subsection (c) of this section to receive retirement pay under this subsection and who retires under subsection (a)(3) of this section shall receive retirement pay for any period at a rate -

"(A) equal to the rate of the salary payable to a bankruptcy judge for such period if before such retirement the bankruptcy judge who so elects serves as a bankruptcy judge not less than ten years, or

"(B) equal to 50 per centum of the rate of the salary payable to a bankruptcy judge for such period if before such retirement the bankruptcy judge who so elects serves as a bankruptcy judge less than ten years.

"(3)(A) Such retirement pay shall begin to accrue on the day following the day on which such judge's salary as a bankruptcy judge ceases to accrue, and shall continue to accrue during the remainder of the life of such judge.

"(B) Retirement pay under this section shall be paid in the same manner as the salary of a bankruptcy judge.

"(4) In computing the rate of retirement pay under this subsection, that portion of the aggregate number of years of service which is a fractional part of one year shall be eliminated if it is less than six months, or shall be counted as a full year if such part equals or exceeds six months.

"(c)(1) A bankruptcy judge may elect to receive retirement pay under subsection (b) of this section by filing notice of such election in writing with the Director of the Administrative Office of the United States Courts. The Director shall transmit to the Office of Personnel Management a copy of each notice filed under this paragraph.

"(2) Such election may be made by a bankruptcy judge only during such judge's term of office or on the day on which such judge's successor takes office.

"(d) In the case of any bankruptcy judge who files an election pursuant to subsection (c) of this section to receive retirement pay under subsection (b) of this section -

"(1) no annuity or other payment, except as provided in paragraph (3) of this subsection, shall be payable to such judge under the civil service retirement laws with respect to any service performed by such judge (whether performed before or after such election is filed and whether performed as a bankruptcy judge or otherwise),

"(2) no deduction for purposes of the Civil Service Retirement and Disability Fund shall be made from retirement pay payable to such judge under subsection (b) of this section or from any other salary, pay, or compensation payable to such judge, for any period during which such election is in effect, and

"(3) such judge shall be paid the lump-sum credit computed under section 8331(8) of title 5 of the United States Code upon making application therefor with the Office of Personnel Management.

"(e) A bankruptcy judge who desires to retire under subsection (a)(3) of this section shall furnish to the President a certificate of disability signed by the chief judge of the circuit in which such bankruptcy judge is serving.

"(f)(1) A bankruptcy judge who files an election under subsection (c) of this section to receive retired pay under subsection (b) of this section may revoke such election at any time before the first day on which retirement pay would begin to accrue with respect to such judge but for such revocation.

"(2) Any revocation under this subsection of an election shall be made by filing notice of such revocation with the Office of Personnel Management. The Office of Personnel Management shall transmit to the Director of the Administrative Office of the United States Courts a copy of each notice filed under this paragraph.

"(3) In the case of a bankruptcy judge who revokes under this subsection an election made under subsection (c) of this section -

"(A) for purposes of this section, such judge shall be treated as not having filed such election, and

"(B) for purposes of section 376 of this title -

"(i) such judge shall be treated as not having filed an election under subsection (a)(1) of such section,

"(ii) subsection (g) of such section shall not apply with respect to such judge, and the amount credited to such judge's account under subsection (e) of such section, together with interest at 4 per centum per annum to December 31, 1947, and 3 per centum per annum thereafter, compounded on December 31, of each year to the date on which the revocation is filed, shall be returned to such judge, and

"(C)(i) for purposes of the civil service retirement laws, no credit shall be allowed for service as a bankruptcy judge unless with respect to such service such judge deposits in the Civil Service Retirement and Disability Fund the amount required by the civil service retirement laws, and

"(ii) if such judge deposits the amount so required, then the Administrative Office of the United States Courts shall deposit in the Civil Service Retirement and Disability Fund an amount equal to the amount it would have contributed to such Fund but for the effectiveness of the election made by such judge under subsection (c) of this section to receive retirement pay under subsection (b) of this section. Upon such deposit, services as a bankruptcy judge shall be treated as service with respect to which deductions and contributions had been made during the period of such service.

"(g) Except as otherwise provided in this subsection, the provisions of the civil service retirement laws, including the provisions relating to the deduction and withholding of amounts from basic pay, salary, and compensation, shall apply with respect to service as a bankruptcy judge, together with other service as an officer or employee to whom such civil service retirement laws apply, as if this section had not been enacted.

"(h) Subparagraphs (i) and (ii) of section 8331(1) of title 5, United States Code, shall not apply with repsect to a bankruptcy judge holding office on the date of enactment of the Bankruptcy Court Act of 1982 for any period during which there is not in effect an election made by such judge under subsection (c) of this section to receive retirement pay under subsection (b) of this section.

(h) The table of sections for chapter 17 of title 28, United States Code, is amended by adding at the end thereof the following new item:

"377. Bankruptcy judges.".

(i) Section 451 of title 28, United States Code, as amended by section 213 of the Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2661), is amended -

(1) in the first paragraph -

(A) by inserting ", bankruptcy courts constituted under chapter 6 of this title" after "chapter 5 of this title", and

(B) by striking out "and bankruptcy courts, the judges of which are entitled to hold office for a term of 14 years", and

(2) in the third paragraph -

(A) by inserting "bankruptcy courts," after "district courts,", and

(B) by striking out "and bankruptcy courts, the jduges of which are entitled to hold office for a term of 14 years".

(j) Section 1293 of title 28, United States Code, is amended -

(1) in subsection (a) by striking out "160(a)" and inserting in lieu thereof "163(a)", and

(2) in subsection (b) by striking out "160" and inserting in lieu thereof "163".

(k) Section 1334(a) of title 28, United States Code, is amended by striking out "160" and inserting in lieu thereof "163".

(l) Section 1471 of title 28, United States Code, as enacted by the Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2668), is amended to read as follows:

§1471. Jurisdiction

"(a) Except as provided in subsection (b) of this section, the bankruptcy courts shall have original and exclusive jurisdiction of all cases under title 11.

"(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the bankruptcy courts, the bankruptcy courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

"(c) Subsection (b) of this section does not prevent a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or decision not to abstain, is not reviewable by appeal or otherwise.

"(d) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all the property, wherever located, of the debtor, as of the commencement of such case.

(m) For purposes of this section, the term 'bankruptcy judge' means, unless specified otherwise, a referee in bankruptcy or bankruptcy judge holding office on the date of enactment of this Act or a United States bankruptcy judge.

Sec. 3(a) Section 402 of the Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2682) is amended -

(1) in subsection (b) by striking out "April 1, 1984" and inserting in lieu thereof "October 1, 1982", and

(2) in subsection (e) by striking out "April 1, 1984" and inserting in lieu thereof "October 1, 1982".

(b) Section 406(a)(1)(A) of the Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2686) is amended by striking out "after March 31, 1984".

(c) Section 406(b) of the Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2686) is amended to strike out "before January 3, 1983," and "after "March 31, 1984".

(d) Section 409 of the Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2687) is amended -

(1) in subsection (a) by striking out "April 1, 1984" and inserting in lieu thereof "October 1, 1982";

(2) in paragraph (1) of subsection (a) by striking out "September 30, 1983" and substituting in lieu thereof "September 30, 1982";

(3) in paragraph (2) of subsection (a) by striking out "March 31, 1984" and inserting in lieu thereof "October 1, 1982";

(4) in subsection (b) -

(A) by striking out "March 31, 1984" and inserting in lieu thereof "September 30, 1982";

(B) by striking out "April 1, 1984" and inserting in lieu thereof "October 1, 1982", and

(C) by striking out "April 1, 1985" and inserting in lieu thereof "October 1, 1983"; and

(5) in subsection (c) by striking out "March 31, 1984" and inserting in lieu thereof "September 30, 1982".

Senator **Heflin**. I am going to call next Mr. Edward Creel, chairman of the bankruptcy division of the American Bar Association, Dallas, Tex.; Mr. Lawrence King, chairman of the legislative committee, National Bankruptcy Conference, New York; Mr. Joe Friend, the president of the Commercial Law League, New Orleans; Mr. Michael Cook, attorney-at-law in New York.

I have a vote on, but if you will go ahead and make your statement for the record, and Mr. Velde, if you have to exercise any common law contempt proceedings, you are invested with that right. [Laughter.]

I'll be right back.

Mr. **Velde**. Please proceed, as you wish.

STATEMENTS OF EDWARD CREEL, ATTORNEY, CREEL & ATWOOD, MEMBER, BUSINESS BANKRUPTCY COMMITTEE, AMERICAN BAR ASSOCIATION, DALLAS, TEX.; LAWRENCE KING, CHAIRMAN, LEGISLATIVE COMMITTEE, NATIONAL BANKRUPTCY CONFERENCE, NEW YORK, N.Y.; JOE FRIEND, PRESIDENT, COMMERCIAL LAW LEAGUE, NEW ORLEANS, LA., ACCOMPANIED BY CHARLES F. VIHON, SPECIAL COUNSEL AND ANDREW M. DI PIETRO, CHAIRMAN, BANKRUPTCY COMMITTEE, COMMERCIAL LAW LEAGUE OF AMERICA, AND MICHAEL COOK, ATTORNEY, SKADDEN, ARPS, SLATE, MEAGHER & FLOM, NEW YORK, N.Y.

Mr. **Creel**. My name is Ed Creel, shall I begin?

Mr. **Velde**. Yes.

Mr. **Creel**. I am a practicing lawyer in Dallas, Tex., I am a member of a number of groups because I am a practicing lawyer. I am not the head of the group that is labeled on my invitation, and I do not speak for the American Bar Association. I have been practicing bankruptcy law for about 15 years. I specialize in working out small businesses and their problems. I am appalled at the effect of the *Marathon* decision, and I very much fear the chaos that will ensue if Congress doesn't act.

It occurred to me while I was sitting in the audience and listening that the Congress is really kind of faced with a practical bankruptcy problem. The Supreme Court has called your loan, you don't have much time, you don't have a whole lot of alternatives, you have got to gather an awful lot of facts in a hurry, which is just what a bankruptcy lawyer does; you have got to find out what your alternatives are, and then, right or wrong, you have got to act. The only thing that is available otherwise is to not act, and your company, your bankruptcy court system, is simply going to die. That is not an acceptable alternative to a bankruptcy lawyer, and certainly it should not be an acceptable alternative to the Congress. You have a problem, it can be cured, there are alternatives, one must be selected; there are no alternatives that I can see to no action that is justified.

So it is kind of interesting, as a bankruptcy lawyer, to see a bankruptcy problem put on the Congress by the Supreme Court.

The best way that I know how to show you what worries me as a practitioner is to just give you an example of the kinds of things that we are now doing under the Bankruptcy Code and the many bases that are touched during the course of a proceeding. The thing that distinguishes bankruptcy problems from other legal problems is that time is absolutely essential in bankruptcy matters. Litigants may or may not have the luxury of putting their positions before a court, but a dying business doesn't have any luxuries; it must have immediate response, or the business fails. And failure is not an acceptable solution.

I have a case now that is pending that involved initially about 180 retail stores that dispensed eyeglasses. The company came to us last October. The company was owned by two warring families, 50–50, which meant that nobody had any power; the board of directors had no power because the shareholders couldn't agree on anything. The company was overdrawn at the bank, the payroll was due tomorrow; nobody would lend it any money; it had been losing money for 10 years, had 500 employees, did $10 million a year in business. The client walked into the office—or a member of one of the warring families walked into the office and said: "We can't make payroll tomorrow, nobody can agree on a solution, what do we do? Fix it, Mr. Magic."

Well, what can you do? What we did was, we went to our bankruptcy court, where everybody has to go for all issues, we kicked out one of the members of the family, we took his voting power away from him and gave it to his wife so she and the other 50 percent could elect a board, so the board could hire a lawyer, so the lawyer could file the chapter 11. I went to a commercial lender that I deal with, and I said: "Please lend us $300,000 for tomorrow's payroll, I really don't know what the assets are, I really don't know what the liens are; I think there are assets which are probably clear, or at least there is enough equity there to cover you." So the lender said: "OK, at 6 over prime, we will give you $300,000 and you can make payroll tomorrow."

We then immediately began to sell off assets that the company didn't need to raise some cash to operate; we terminated leases at 60 stores around the country and just shut them down over the screaming anguish of the landlords; we trimmed the business, cut the overhead, used the new $300,000 line of credit to get the business back to operation. I am pleased to report that we have a confirmation hearing set the 19th of August; the families have now calmed down a little bit, the stores are down to a lean budget; business is a little slow, but it's profitable, the creditors understand that they are not going to get paid for awhile, but, because there is profit, they probably will get paid down the road—otherwise they don't get paid at all. Internal Revenue wanted $14 million out of the business for 10 years worth of back taxes; they have agreed to take $2 million over 6 years—Congress has allowed us to force them to take 6 years for the payout. And the company will probably survive. It was an interesting case, a difficult case, it had to move fast. We had to have a decision on who ran the company in one afternoon; if we had no decision, we had no company. We had to borrow money in one afternoon; if we had no money, we had no payroll. We had to sell assets fast; we had to sell assets under the power of the court, because, gentlemen, in the real business world, outside of all of these things that we can talk about in closed rooms—in the real business world, if the buyer doesn't think he is getting absolute title, and if he doesn't think the court has the power to act, he isn't going to buy the property. We can argue about the power of the court all day long—but the buyer isn't going to spend any money. If a title company doesn't believe that the power of the court is absolute, and there are not any *Marathon* questions about its jurisdiction, the title company isn't going to issue the policy. If the title company doesn't issue the policy, the land isn't going to get sold and the money isn't going to be raised.

The point is, there has to be a place to go.

Now, we touched on a lot of things in that case at the beginning that are, "private rights" under the plurality opinion. We touched on a lot of things that may or may not be "public rights" under the plurality opinion. We touched on things that were "summary" and we touched on things that were "plenary." And I assert here that there is a distinct difference between "summary/plenary" jurisdiction and "public rights/private rights" jurisdiction. This Congress has never addressed the "public-right/private-right" definition of jurisdiction, and that is going to be one hell of a challenge, if that is what you decide to do.

The point is, we touched on "private rights" all over the place; we took away the husband's shareholder voting rights; we had a court order that property could be sold free and clear of liens and affected the right of people who asserted liens. We terminated leases where, under State law, we did not have the right to do so. We consolidated 12 different losing corporations into one entity to pick up the tax advantage of consolidated filings and the lowering taxes because of alter-ego status. We did it arbitrarily in a bankruptcy court where there was the power. We have recovered property in that case from third parties who had possession and who had State court "private rights" to that possession and to that property. We have done it fast, but we have done it fairly—we have done it on notice, we have done it at hearings; we have done it with evidence; we have done it with opportunities for all to be heard, we have done it in one place, and we have done it. You can't do it any other way.

Mr. VELDE. Mr. Creel, on that point, would it have been possible to go into a State bankruptcy court under those set of facts you describe, and get similar relief?

Mr. CREEL. Absolutely not. There is no regard for State court receivership actions in our State, because they don't work. There is a great deal of question over the interstate authority of a State court judge to act. Obviously, he can't sell a piece of property in Puerto Rico, where one of ours is. No, it won't work. When you are dealing with a company that is anything more than local and you are dealing with properties that are distributed over an area that is more than statewide, and you are dealing with judges that don't have the powers that a bankruptcy judge has, it simply does not work. And we can sit here and talk about 1 million different ways to get it done—and, I assure you, they will not work.

I have talked to lawyers and friends all over the country—as I mentioned, I do belong to a whole bunch of committees, which keeps me busy. We have all tried to pick our brains to find alternatives, because we know that there are some substantial political problems in what is being requested. We have unanimously come to the conclusion that there is only one alternative, the judges must have the article III power. Otherwise, simply throw away the Bankruptcy Code. If you do that, let's please go back to the Bankruptcy Act, because it worked pretty good, it just didn't work as good as this one does.

It is the unanimous opinion of everyone that I have talked to that article III is the answer. If there needs to be some hierarchy of judges and you in the Congress need to make bankruptcy judges have some lower level, there are lots of ways to do that—Judge Gandy has already commented on that. I think one possible solution might be—and I have mentioned it in the remarks, Senator, in the file here—that perhaps you don't name 200 or 300 bankruptcy judges now, maybe just one in each district, and let them parcel their power out to special masters, where we already have mechanics for others to help a court find facts. If the political distaste for 300 new life-tenured judges is too great to allow the power to be disseminated now, then just do it a little bit, find a compromise—but find a compromise, and give the judges the power to solve these problems.

A couple of other real quick comments and let me pass on to the other members here.

One thing that concerns me is there is a lot of bankruptcy legislation before the Congress now. I urge you please keep your eye on the ball; we have an emergency problem, let's solve it, let's don't get involved with the other bills and all of their problems. Let's get this problem solved, because otherwise the others are truly irrelevant.

I don't think it is productive to get into a discussion of the nuances in the opinions—what this judge thought or what that judge thought. The thing that matters is what does the marketplace think, what do the people that write the checks think, what do the people who buy the properties think. They are not going to buy anything, they are not going to spend any money, because it's confusing, and there are too many other deals in town. Just assume that the bankruptcy jurisdictional grant is unconstitutional, and fix it.

If you need to have just a few judges instead of a whole lot of them, there are lots of experts around that know a lot more than I do who ought to be able to predict how many judges you need at a minimum. If we get to a maximum later, we can worry about maximums later. But we ought to be able at least to figure out what a minimum number is. Pay them a little less, give them a little less, whatever you need to to keep the hierarchy straight. And during the interim time—and we all recognize there is going to be an interim time, as Senator Heflin seems to be most concerned about—there are ways to take the absolute article III power in the Federal district judges and let that power be used on a short-term basis indirectly through a bankruptcy court.

In my remarks that are in the file you will find four or five ideas; I am sure these gentlemen have a lot more ideas. The point is, Congress is smart enough to figure out a way to let Federal district judges use their power for a short time, even though it is duplicitous, until we get the article III judges in place.

Please, gentlemen, don't let all these companies die. Keep everything in one place; make it an efficient place; make it an effective place, and give us article III judges.

Thank you.

Mr. **Velde**. Thank you, Mr. Creel, your statement will be made a part of the record, as will the statements of the other witnesses on this panel.

In order of their appearance on the witness list, I would call on Mr. King.

Mr. **King**. Thank you, my name is Lawrence King, I am the Charles Seligson, professor of law at the New York University School of Law. I have been teaching bankruptcy courses in addition to other courses at that university for a little more than 20 years.

Mr. **Velde**. Professor King, I believe you are not a witness that is appearing for the first time before this committee.

Mr. **King**. Thank you very much. I have a written statement which has been submitted on behalf of the National Bankruptcy Conference, and I am appearing on behalf of the National Bankruptcy Conference at this time.

I will make a very short statement, because many of the things that I had planned to say have already been said; I will try not to repeat very much and just hold myself available for questions.

I think that the most important issue that is facing the Congress in light of the *Marathon* decision, is not whether the bankruptcy court should be an article III court or an article I court or some other kind of court, but whether Congress will fulfill the promise that it embarked on a few years ago as a result of a lot of study, a lot of investigation, which is to have one court with pervasive jurisdiction, so all matters that had to be tried in a bankruptcy case, a chapter 11 reorganization case, a chapter 7 liquidation case, or a chapter 13 individual wage-earner case, could be tried in that bankruptcy court.

The Supreme Court has now said that that cannot be done with an article I court. It's not a question as to whether there is an alternative to the article III court. The fact is—and it seems very clear, and this is probably the only thing that anybody can agree on with respect to the Supreme Court decision—is that only an article III court can accomplish the purpose of having pervasive jurisdiction, of having one bankruptcy court, which can handle all matters that may come up together with the power of abstention. If at any point it were decided to go back either to pre-1978 law or to create an article I court with some type of limited jurisdiction, there is still no guarantee that that statute would be held constitutional by the Supreme Court of the United States. It was pointed out in the *Marathon* opinion, even though one of the opinions intended to finesse the point, but it was then pointed out in a footnote that the Supreme Court has never passed on the constitutionality of the bankruptcy courts as they existed prior to 1978. Therefore, if Congress were to go back to that and create an article I court in any form, first, every issue would again be litigated up to the Supreme Court as to its constitutionality—that is No. 1. Second is even more important perhaps, because after some point in time at least hopefully that might get resolved. The second problem that would still exist is that there would have to be some test for determining the limit of the bankruptcy court's jurisdiction regardless of how it is phrased in the statute; that is, I don't believe there is any way of phrasing it in the statute so that it would be clear. Any disgruntled litigant, any defendant who did not want to have the case tried in the bankruptcy court would raise the issue of jurisdiction. Let me raise one further point on that.

As you all know, the 1978 Bankruptcy Code does not apply to bankruptcy cases that were pending in the courts on September 30, 1979. There are still such cases around. The old Bankruptcy Act of 1898 still applies to those cases. Under that Bankruptcy Act there was the dichotomy of summary/plenary jurisdiction. Today, in the reports that come out weekly, biweekly, monthly, or whatever, you still see decisions of bankruptcy judges, district judges, and judges of the courts of appeals of the United States on the issue of summary jurisdiction versus plenary jurisdiction. It is still necessary to make those determinations under the old Bankruptcy Act of 1898. Those are, as Judge Gandy said, issues which are completely wasteful in terms of time and money because they have nothing to do with the merits of the case. Today there are major chapter 11 cases pending in the courts throughout the country—Los Angeles, Chicago, Dallas, Detroit, New York, only to mention a few. There is the *Itel* case in San Francisco, the *Wickes* case, *Sambo's* case, *AM International, Saxon Industries*, and the like.

If Congress does nothing until October 4, if there is no action taken by then—and certainly after October 4 everything comes to a grinding halt—you are not only talking about lawyers who are involved in the bankruptcy practice being in a quandary, or the judges being in a quandary, but I would have great worry of the hundreds of thousands of employees involved or working for these companies undergoing reorganization under chapter 11 who may then have no companies to work for because there would be no courts enabled to handle those cases.

Mr. Creel was talking about financing a chapter 11 case. He also mentioned the problem in getting a seller to buy property. Regardless of how much we may talk in this room, there is also a problem of getting banks and other lenders to lend money to chapter 11 debtors as long as there is a jurisdictional issue. And as long as there is an article I court, there will always be the jurisdictional issue. Lenders are not going to lend money when there is some risk as to the ability or the authority of the court to authorize such lending, whether with priority, with liens, or whatever. So there are, in addition to everything else, extremely practical problems.

I will close with the one point which I think is also of such importance that it is worth repeating and worth emphasizing. This issue is of such an urgent nature that I would strongly urge this Committee and the entire Senate to treat it separately, and not to tie up any other legislation that may be proposed to amend the Bankruptcy Code with it by way of unrelated amendments.

Thank you.

Mr. **Velde**. Professor King, you have been a student of the bankruptcy process over a long period of time. What is your view of the current volume of pending cases before the bankruptcy courts? Is this something that is somewhat out of the ordinary because of the economic downturn, or possibly because of the changes made by the 1978 Act? If Congress is trying to predict now the number of judges to be needed in the future, not just to deal with the current volume of business, is the current level of bankruptcy judges on the high side or on the low side, or what is your guess?

Mr. KING. I think the current level of judges is probably on the low side. I would certainly hope that that would not continue to be true. In other words, going back to your original question, I would certainly hope that the economic conditions in the country do not remain as they are now. I believe it is those conditions that have created the extreme rise in the filing of bankruptcy cases. I do not believe, and I never have believed, that that was caused by the Bankruptcy Code of 1978. It certainly could not be the major cause; it has to be the economic conditions. I would certainly hope that those conditions at some point will turn around.

Now, because of the increased filings, the bankruptcy judges today are extremely overburdened; I don't think there is any question about that whatsoever. If you were to make a survey, I am sure you would find bankruptcy judges throughout the country who start their court calendars very early in the morning and run their court calendars very late at night, some even are willing to work on weekends, in order to try to keep current.

Of course, if the filings go down, if the economy turns around and the filings go down, then you may end up in a situation where there may be too many judges. I think there are ways of handling this. I think that there are one, two, or three alternatives or a combination of all three. One, for example, would be to appoint as article III judges something up to the current number of bankruptcy judges; even though today that may be not enough, perhaps it is not necessary to appoint more. But let's just take the number arbitrarily. I think the legislation could provide that as positions become vacant they would have to be reauthorized by Congress before they could be filled, so that as time went on Congress would have the opportunity, perhaps through the Administrative Office, or the Judicial Conference, to continue to make studies as to the need for or the numbers of bankruptcy judges. That is one way.

[Senator Heflin resumed the chair.]

Mr. VELDE. In our parlance, permanent versus temporary positions, but since these are lifetime appointments, temporary position may well mean a good long while before there is any flexibility.

Mr. KING. Well, I think that is a question of time. I don't know how to predict how long it would take them to be able to authorize, reauthorize, or unauthorize positions, that's correct.

I think another facet of it would be to appoint something less than the 200 or 220 bankruptcy judges and to take a look to see wnether part of the problem, at least, is an overburdening the paperwork that all of these cases generate. Perhaps with an increase in clerical help a good bit of the problem can be alleviated without having quite as many judges.

A third solution, which would be a very good one, because long run it would be extremely helpful—it is something that could stay in place—would be to make applicable nationwide the U.S. trustee system. I think it is found in many of the pilot districts where there is the U.S. trustee, a good bit of the bankruptcy judge's administrative work has been taken from the shoulders of the judge, so that the judge can use the time solely for judicial purposes that is to resolve disputes. That certainly was the theory of the code, and my experience has been that that is the practice as well.

Mr. **Velde**. Mr. Chairman, so far two of the witnesses on the panel have presented their statements; there are still two to go.

Senator **Heflin**. All right, the third.

Mr. **Friend**. Mr. Chairman, thank you very much. I am Joseph E. Friend from New Orleans, La., where I practice law as a member of the firm of Dodge, Friend, Wilson & Spedale, and I appear here today representing the Commercial Law League of America, an organization of approximately 6,000 people throughout the United States, about 85 percent of whom are lawyers, and of which I am the president.

Accompanying me are Charles F. Vihon, special counsel to the league, on my right, and former bankruptcy counsel to the House Judiciary Committee. Also present behind me is Andrew M. DiPietro, Jr., of New Haven, Conn., who is chairman of our bankruptcy committee.

Mr. Chairman, I will not read this entire statement, which is filed in the record, but I did want you to know who we represent and that we wish to add our urgings to those other urgings that you have heard, and I suspect you will continue to hear, concerning the fact that there are no practical alternatives to appointing article III judges if we are to continue to have a unitary court.

Our organization, our people, do not only practice law in large cities or large commercial centers; they practice law all over the country, and they universally feel that the bankruptcy system presently instituted is working. So the only question really is whether we want to change the system. No one has to tell any of us here certainly that those present political problems, and practical problems. But they have to be solved, because you agreed, as the other witnesses have said today, that the system should be put into effect—and you put it into effect, you made it work. And now you are charged with the responsibility I think of continuing to make it work, and there is no serious dissent so far that I have heard that it can be made to work in some other fashion on any permanent basis.

Mr. Chairman, with that I would yield to the next speaker and answer any questions which the committee may have.

Senator **Heflin**. All right, that would be Mr. Cook.

Mr. **Cook**. Thank you, Mr. Chairman. As requested, I have submitted a statement with my own comments. I want to emphasize that although I have represented a number of diverse clients and have been associated with a number of entities, these comments are my own. I also want to confine my oral remarks to the most salient points and emphasize what has not previously been mentioned.

Like the other witnesses, I think that Congress must make the bankruptcy court an article III court so long as the *Northern Pipeline* decision stands. The only alternative is to limit the bankruptcy court's jurisdiction, something that Congress wisely chose not to do in 1978, because everybody who testified before Congress, everybody who studied the problem for years, including a congressional commission, agreed that a bankruptcy court of limited jurisdiction had been a disaster, to state it mildly.

The only position that I have seen or heard opposing article III status is to the effect that making bankruptcy judges article III judges will somehow diminish the prestige and influence of existing Federal district judges and court of appeals judges. I think, however, that making bankruptcy judges article III judges can be accomplished without diminishing anybody's prestige or influence.

As a practicing lawyer, I have seen the horrors of having a bankruptcy court of limited jurisdiction. The *Northern Pipeline* decision itself was 2½ years in the making. The litigation had originally been pending 1 year before it was recommended in the bankruptcy court. You won't see that in the Supreme Court's opinion, but you will see it in the lower court's opinion. And it took 2½ years from starting in the bankruptcy court until June of 1982 for a resolution of that problem.

You will see in my prepared statement, moreover, that under prior law, jurisdictional disputes with no ruling on the merits could easily take 3 to 4 years. I gave one example of a case, a piece of litigation starting in February 1963, not being resolved until March of 1967, with tremendous judicial effort. There were 33 days of testimony, more than 3,000 pages of transcript, 125 exhibits, with 3 courts spending intense effort to resolve the jurisdictional dispute.

The most important result of this was delay and expense. Now, this committee in its report accompanying S. 2000, just within the past few months, pointed out that speed and efficiency are vital in bankruptcy cases, and that delay results in devaluation of assets and a lot of other problems. These sound like abstract problems, but as a practitioner I can tell you that the primary victims of this delay, this expense, are the unsecured creditors. All of the expense of fighting over where the dispute should be centered is borne by the unsecured creditors. Somebody has to pay for it. How is it paid for? The trustee's litigation expenses come out of the unencumbered assets of the estate, and, when secured lenders have to fight over jurisdiction, the cost of this litigation is borne by other borrowers. There may not be widows and orphans suffering here, but the additional expense is outrageous. That is why Congress wisely chose in 1978 to make sure that this sort of dispute doesn't happen in the future. Limiting the bankruptcy court's jurisdiction, which, in view of *Northern Pipeline* is the only alternative to article III status, would only increase that expense.

Now, there is a way—and I think that Judge Kline touched on it—of making bankruptcy judges article III judges, while not diminishing the prestige and influence of other Federal judges. There is already in the Bankruptcy Reform Act of 1978—you will see it in title 28, section 1471—an abstention provision. You will see at footnote 17 of my prepared statement a number of bankruptcy courts within the past year and a half have already relied on this abstention provision. The abstention provision is premised on something called the interests of justice. The Supreme Court more than 40 years ago, for example, directed a bankruptcy court with jurisdiction to abstain when there was an unresolved question of State law. The bankruptcy courts who considered this abstention provision, although admitting that they had jurisdiction, have abstained because there were unresolved questions of State law, or because there was litigation already pending in another forum. By making the bankruptcy judges article III judges, Congress can still protect the prestige and influence of other Federal judges by clearly defining standards for abstention.

There are many reasons for keeping the bankruptcy court's jurisdiction broad. In fact, there are many benefits as well. Clients who are in the commercial finance business have reported to me that they have been able to collect receivables of the debtor's estate much more efficiently and get better recoveries because of litigation brought in the bankruptcy court. Not being faced with delays in State courts, not being faced with jurisdictional disputes, has actually helped creditors of the estate. And when it helps creditors, it also helps the debtor in reorganization who needs the cash flow from its accounts receivable.

In short, I think with a relatively minor adjustment to the existing statute, the benefits of the broad jurisdictional provisions of the 1978 reform legislation can be continued, and ought to be. It is absolutely essential that Congress deal with this issue before any other bankruptcy issue.

On July 13, the New York Times reported—and you will see it at footnote 4 of my article—that bankruptcy litigation today is in disarray. Practitioners don't know where to start lawsuits, and when lawsuits are started they are put in cold storage to resolve jurisdictional disputes.

Thank you.

Senator HEFLIN. Assuming that the Judicial Conference and assuming that the Senate continues its opposition against article III judges—that was before I came here, so I am not speaking personally at all—what are the alternatives, first, on a transitional basis, and, second, on a permanent basis. And I think we maybe better address as much attention to transition right now as possible. You have got a limited period of time to act. What are the alternatives?

Mr. CREEL. Well, if I may respond, those are two different questions. With respect to whether or not the judges should ultimately be article III—we covered that, I don't think that could be debated further. As far as the transition is concerned, there are at least three ways that, for a period of time, the power of the Federal district court can be utilized through the bankruptcy court, or utilized directly first.

It seems to me that any litigant who is unhappy with a bankruptcy court's order, if he is given the right of trial de novo, can take his case right straight to the Federal district judge, who can take new evidence, who can completely disregard the holding of the bankruptcy judge below, and who then would be the ultimate arbiter, or at least have the power of ultimate arbitration, and, therefore, exercise that "essential judicial power" that the *Marathon* case talks about. So there is one way to do it, give litigants de novo appeal rights.

Another way to do it is to permit either the litigants or the bankruptcy judge in any trial or at any hearing on a disputed issue to certify questions that anybody thinks may fall within the "private rights" area.

Another alternative is to give any litigant or the court the power to determine, as a threshold issue, whether or not there is a jurisdictional fight at all, and, if there is, don't argue about it, just go straight to the Federal district court—give the parties access, give the court the right to refer.

Those are three different ways that the ultimate disputed rights between parties can be either heard directly or indirectly by the Federal district court.

The disadvantage of doing all those things, of course, is that you engender multiple trials on the same issues, and ultimately it's a very expensive and self-defeating system. But for an interim transition period, it solves the problem by allowing the article III power to be the power that is used, although leaving intact the bankruptcy court and the system that is presently in place and working.

Mr. KING. Well, I would like to add that there is another slight disadvantage to it, that the district judges may not be terribly happy about that. If they are going to get all this litigation, whether by trial de novo or certification or starting out there originally, I don't think the district judges really have much time on their calendars to handle bankruptcy matters nor do I think they have any incentive whatsoever to handle bankruptcy matters.

I do not think the other possibilities—granted that these are alternatives, are any good, they are not workable, and it is not going to help the system any; it will help break down the whole bankruptcy system.

If the article III route is taken—and the chairman asked the question of the earlier panel, recognizing that even if article III was the way to go, you cannot have the article III judges appointed prior to October 4 or even perhaps shortly after October 4—I think there are a couple of things that could occur even then. One is if the Supreme Court sees that action is being taken by Congress, there is a possibility of extending the stay beyond October 4, for how long is anybody's guess, and, of course, nobody at this point can even speak for the Supreme Court. But it seems to me that is a possibility.

A second possibility, as was pointed out in our written statement, and as was mentioned by Judge Gandy earlier, is that perhaps—perhaps, and this is a question, and it certainly is not clear—but under the *Glidden* case and even under the *Marathon* opinion, that if Congress is working toward a constitutional solution, as a temporary measure utilizing article III powers by the article I court would not be unconstitutional. There is that possibility, and I think it is one, first of all, that ought to be investigated and, if necessary, utilized.

Senator HEFLIN. Explain a little bit on that last alternative.

Mr. KING. Well 'there is some language in the *Glidden* opinion of the Supreme Court by Mr. Justice Harlan that the temporary exercise of article III powers by an article I judge is not unconstitutional if it is during the period when Congress is attempting to effect a solution; when I say that that may even be a possibility under the *Marathon* case itself, what I mean is that the plurality has said that it is unconstitutional for the article I courts to handle all of the power granted under the Bankruptcy Reform Act of 1978, and, at the same time, it stayed the enforcement of that judgment until October 4, 1982.

Now, it seems to me that if it is unconstitutional, it is unconstitutional, if that is what it meant. But if there is a possibility of staying, and that stay, of course, is effective, I think this also means that there can be for a temporary period of time the exercise of power which is not unconstitutional.

But I think the two things have to go hand in hand, that is, action by Congress in the first place.

I am not saying that this is a foregone conclusion. I am only saying this is a possibility. Would this be attacked? Yes, I think someone would attack the legitimacy of the position. A litigant would take it to the courts and it would go all the way up. Hopefully, by the time it reached the Supreme Court of the United States, if the article III route were followed by Congress many article III judges would by that time be in place and many of the issues would become moot by that time.

Senator **Heflin**. If you did something like that—I suppose you could put some language in that might expedite the U.S. Supreme Court's decision on the matter.

Mr. **King**. That would be possible. It will always be possible to develop in the legislation some expediting appeal route, yes.

Senator **Heflin**. I am speaking from memory, and it's hazy, but somewhere in the back of my mind is that generally civil cases on de novo are about 10 percent of the cases. You take a de novo appeal from civil cases. This is only a ballpark figure. Because of the bankruptcy type cases and their nature they would probably be a higher percentage of de novo appeals than in the ordinary civil case?

Mr. **Friend**. Mr. Chairman, I would like to try to answer that. I think so. I don't know what the 10-percent number means—I assume it's from your judicial experience. But bankruptcy grew up in the last 3 or 4 years—there have always been a few big cases around, but I call to your attention that when Lockheed got in trouble Congress bailed it out, when Chrysler got in trouble. That's not happening anymore. These cases all of a sudden in the last few years have not only gotten more in number, but much bigger in number and size and importance.

If I were a creditor and I had $20 million at stake and a bankruptcy judge ruled against me, I would think nothing of going immediately to the district court de novo.

Senator **Heflin**. That would put it in the 1-percent category.

Mr. **Friend**. Sir?

Senator **Heflin**. When you are going to get into 20 million.

Mr. **Friend**. Well, that might be so, but I think even—first of all, what's been happening in the courts generally is that we are getting very fast action, very quick trials and very quick decisions. It doesn't really cost that much, so even when we are not talking about $20 million, even if we are talking about thousands of dollars, which we talk about most of the time in most of these business cases, small business cases, if we could get to the district court and get on his summary docket de novo, yes, but if we are talking about getting on his nonsummary docket so we have to try the case—I don't know what districts are like anywhere than the eastern district of Louisiana, but they are as busy there as most places, very busy, you are just not going to get on that docket quickly, so you might as well get on it, might as well file your case all over again, sure.

Mr. **Creel**. But the case goes on—that's the important thing about that. An appeal right is a nicety, and it may be a patch for constitutionality, but the practical result is—first, not many are appealed—that time, the critical issue, is not lost. Time is what matters in a bankruptcy case. By the time you get around to the appeal and by the time the Federal district judge hears it, it probably doesn't make any difference anyhow. The effectiveness of the bankruptcy court's ruling, as a practical matter, is probably going to be controlling in any event.

Senator **Heflin**. Well, certainly if you got into the de novo situation, you are going to minimize appeals involved, I suppose; otherwise you could be really consuming time.

Mr. **Creel**. That's a whole other ball game.

Mr. **Vihon**. Senator, when Harold Marsh was Chairman of the Commission on the Bankruptcy Laws of the United States and appeared before this committee, he presented some testimony which I think is very relevant to the question you have just asked, and I would like to read just a very short part of it.

> It is absolutely essential that there be expedition in the determination of controversies in bankruptcy proceedings. The reason for that is the time value of money. If every controversy in a bankruptcy proceeding had to be docketed in the Federal district court and put on the calendar and taken up at the end, whenever it came up on the calendar, then most bankruptcy proceedings would not be worth carrying on because there would be nothing left at the end of that process. The only value that can come out of the bankruptcy proceeding to creditors depends upon the conclusion of the proceeding in an expeditious manner. If each controversy in a bankruptcy proceeding were treated as simply another civil case to be put on the docket of the district court, then the delays that it would cause would simply destroy the value of most estates in bankruptcy.

I think that this is merely in further support of what Mr. Creel testified to earlier, using the example of the case in which he was involved, the expeditiousness with which you have to move to determine issues that have to do with the value of the assets of the estate, the payment to employees, the protection of the ongoing business, the ability to make business decisions, the ability to borrow—these are all matters that are inextricably interwoven with the ultimate success of the case. And they could in fact, each individual one of them, be subject to an independent piece of litigation. And it had to be determined before the substantive questions were ever reached, in which forum is that question properly determinable, the baby gets thrown out with the bath water.

Senator **Heflin**. Well, this is a complex problem. The more and more you get into this thing, it's going to have——

Mr. **Friend**. Mr. Chairman, may I make a point with regard to the 200 or 220—the number varies depending on what I have heard, probably closer to 220, I think—judges who are presently serving, some of whom are part time. By April 1, 1984, this process essentially would have had to occur anyway. I believe the law says that the President would have had to appoint somebody and the Senate would have had to consent to those appointments. I do not know whether the process would have been identical to the district judge process, the same paperwork, and all the same FBI background check and all that. But the essential process would have been the same.

And I don't think anybody here is suggesting that you have to appoint the same 220 bankruptcy judges. But you do have to go through that process. And having gone through it, you would have appointed whatever number you appoint for 14 years.

Senator **Heflin**. Well, from a political basis, don't worry about it. Any time that the Presidential appointment and Senators and their friends are involved, you are going—the political process will prevail over the judicial. [Laughter.]

I really don't anticipate that if they go to an article III, that they are going to be grandfathered.

Mr. **Friend**. I didn't mean it that way. I meant the process has to occur anyway somehow—that's all I meant.

Mr. **Vihon**. For the Senator's information—I am sure that you may be aware of it, but have forgotten it—the provision in section 2 of article 2 of the Constitution provides an alternative process by which officials of the United States can be appointed, and the appointment by the President, by and with the advise of the Senate, is only one. In the instance of lesser officers of the United States—and I don't think the constitutional language "lesser officers" is intended to be derogatory at all, but rather to refer to the differences between those officers who are specifically identified in the Constitution as against those who are identified by some act of Congress—but with respect to the lesser officers of the United States, the appointment process does not necessarily have to involve appointment by the President by and with the advice and consent of the Senate; it could be a designation by the President alone, by the courts of law, or by the heads of departments.

Senator **Heflin**. Well, they wouldn't be article III judges, though.

Mr. **Vihon**. I believe the article II, section 2, appointment power would apply to a judge whose stature would be determined under article III of the Constitution, yes. The only difference between the types of appointment powers is predicated on the distinction between lesser officers of the United States as compared with those who are identified in the Constitution, which I think is what the distinction is intended to reflect.

Senator **Heflin**. I believe you would have some nice litigation on that.

Mr. **King**. More than a little.

Senator **Heflin**. What problems do you see where in effect jurisdiction is in the district court and he delegates a master or magistrate, that type of thing—I can see where you would certainly in interlocutory decisions which would arise, unless you carefully crafted it—but what problems do you foresee if you attempted to follow some route that the judges would have authority to delegate certain tasks, certain factfinding functions, similar to what a magistrate can do and masters can do, and other matters of that sort pertaining to the bankruptcy?

Mr. **Creel**. Well, there is one thing for sure, you would have more problems than if you didn't do it, than if you went straight to article III. None of the suggestions, none of them that I have heard today or before today, are as good as going straight to article III.

The only reason we are even talking about this other stuff is because——

Senator HEFLIN. Well, there's no question that for simplification—the simple solution would be to do that. But there may be problems. I have already heard two or three Senators who have been contacted by their judges in the district court back home: don't do it. I have not. But assuming, certainly from a transitional viewpoint, that it is not done, could you address that question?

Mr. CREEL. There would be problems by any losing litigant whose lawyer wanted to study a way to raise problems on appeal, whether they be jurisdictional or procedural. It is merely a stopgap suggestion. We have history with special masters, we have Federal rules for special masters, we have precedent for them in the legislation that was crafted to take care of the transition period. Presumably your good draftsmen would spend some time with those precedents and outline it in as much detail as possible to specify which matters could be heard or delegated and which could not. The more specificity, the less problem. However, there would be problems with it, no question about it.

Mr. COOK. If I may respond briefly to that, Senator, the first issue that would be litigated would be whether this dispute is the type that Congress intended to be referred to a special master. Having read the Supreme Court's opinion, Chief Justice Berger says in his dissent that all the plurality holds is that the typical garden-variety State common law suits cannot be heard in a bankruptcy court without the litigants' consent. Presumably, and implicit in his opinion, is that the traditional bankruptcy claims could be heard in the bankruptcy court as an article I court. But what about Federal antitrust claims, what about securities law violations, and what about the typical case where there are mixed claims—traditional bankruptcy law claims, State law claims, and a Federal securities law claim? It is very hard to legislate around that.

One thing I can tell you, based on extensive difficult commercial litigation, if there is any sort of problem, if there is any sort of uncertainty over jurisdiction, it will spawn only more litigation. Large commercial debtors very often have been involved in extensive litigation before they get to the bankruptcy court, which happens to be the last stop. And when they are up against the wall, they will raise every conceivable argument. And jurisdication will just be another litigable issue, unfortunately.

Mr. KING. I think, too, it ought to be recognized with respect to the dissenting opinion of the Chief Justice that while he is referring to the cause of action involved in the *Marathon* case and saying that that is the common variety of State-created cause of action which normally would go into State court, it must be remembered that many issues that are litigated in a bankruptcy case are of such a nature even though they don't look like it. For example, a creditor files a proof of claim in an ordinary garden-variety bankruptcy case, and let's say the trustee in bankruptcy objects to that claim. That is essentially the same thing as a civil action in a State court, because the same issues are involved. Was this a properly formed contract under State law? Are there defenses under State law? All of State law is applicable. The same thing is true with respect to a claim of State law exemptions; the same thing with respect to a claim of the dischargability of particular debts where you have State laws involved respecting alimony, support, and the like.

So that it is not at all as simple as the dissent would make it appear. That is No. 1.

No. 2, if there is talk of special masters and the like, of referring matters back from the district court to the bankruptcy judge, it would be more easily remembered by my colleagues on this panel who are much older than I am, Senator. [Laughter.]

Senator HEFLIN. Name one.

Mr. KING. But back in the—up until about the mid-40's, I just don't recall the exact date, that was the system. The bankruptcy judges were not bankruptcy judges, they were referees in bankruptcy, and they essentially acted as special masters. Matters were referred to the referees, the referees reported back to the district judges. It was through the course of time—there was then legislation amending section 39(c) of the Bankruptcy Act of 1898 which then made the decisions of the bankruptcy judge—bankruptcy referee still at that time—final unless an appeal was taken. And then the bankruptcy rules came along in 1973 and carried that thought further by replacing section 39, and then the whole matter was carried even to the proper last step, the final step, which was to grant pervasive jurisdiction under the Bankruptcy Reform Act of 1978.

So, in a sense, if we were to go a special master type route, we would be reverting to the laws that existed prior to the mid-1940's.

Senator HEFLIN. I am not jumping to any conclusions, but I am beginning to feel like if we are going to do anything before October 5—basically you are almost faced with a situation of making it a de novo, then come back and consider the issue thoroughly of article 3, consider the possibility of some delegated powers—similar to masters with defined areas, basically separating the types that you could and you couldn't. And bankruptcy judges could hear one of these other forms of certification threshold type things that you mentioned here, Mr. Creel.

But if we are going to do anything with the timeframe involved and have any degree of certainty—right now, it looks like it is coming down to almost a de novo situation.

Mr. CREEL. It's a sticky problem. As I said earlier, the Supreme Court has called your loan, and there is not much time, and there are not many options. You just kind of have to pick one and hope it's the right one and go on down the road.

Senator HEFLIN. You might, if we adopted the transitional in a de novo, you might all of a sudden find a change of heart among the U.S. district judges as to whether bankruptcy judges ought to be article III.

Mr. CREEL. You cover them up with some of our cases, and I can assure you that that will happen.

Mr. COOK. One other thing, Senator, I think that really has to be underscored. As I understand it, and I have read most of the legislative history accompanying the 1978 act, one of the objectives of Congress was to attract more highly qualified people to become bankruptcy judges—it is not the most glamorous job in the world. That was one of the beneficial results of the 1978 legislation: we have been able to get better judges. I am not a judge, never have been, and probably never will be, but if we go back to making bankruptcy judges special masters or second-class judges, we are going to have, Congress is going to have, great difficulty in attracting people to the bench. As it is, a number of bankruptcy judges have been leaving, very qualified people.

Senator HEFLIN. Well, we appreciate you all's thoughts. Mr. Velde, do you have some questions?

Mr. VELDE. Thank you, Mr. Chairman, just one quick question.

Professor King, did I infer from your comment that you would favor an attempt by Congress to deal with the trustee problem in this setting, in this context, if we could possibly do it?

Mr. KING. No, not necessarily, I would not favor that. I was offering that as a possible solution if it were necessary in terms of number of judges. I think that this matter itself, the court system and the jurisdictional question should, to the extent feasible, along that line be handled separately, and I don't think anything else should be tied up with it. I think even on the trustee system, if there was a thought that that would be helpful, it might even be—it ought to be handled by separate legislation.

Mr. VELDE. Just one other question, with your indulgence, Mr. Chairman.

Senator HEFLIN. Go ahead.

Mr. VELDE. The American Bar Association performs a most valuable public service to the bench and bar in its screening of judgeship selectees, if you will, or potential selectees, for the Attorney General, and giving its ratings to the Justice Department for their use. This is a practice which has been followed by some Attorneys General, not by others.

In the Omnibus Judgeship Act of 1978, Congress mandated the creation of panels to assist in the selection of circuit court judges, merit selection panels, if you will. Assuming that the Congress in its wisdom did decide that bankruptcy judges should become article III judges, do you see the need for some kind of blue-ribbon panel's advice to the bankruptcy bar, or some other kind of advice and counsel in the selection and confirmation process of this new group of article III judges than the current system for the selection of article III judges, and, if so, what would you suggest? Is there a group or groups of the bankruptcy bar that could be pressed into service to assist Members of the Senate and Justice Department in surfacing qualified people for these positions?

Mr. KING. I don't know that it ought to be limited to groups of the bankruptcy bar; I think that it ought to be broader than that, and, if there were such panels, they could be drawn on the lines of the panels that advise on the courts of appeals. I don't think that there would have to be a difference on that score. I do not think the bankruptcy bar has particular expertise; many of the judges presently appointed or appointed in tne past don't necessarily come with a great deal of bankruptcy experience. So I certainly wouldn't limit it to bankruptcy bar. And I think we have had some experience around the country with merit screening panels for new appointments and renewal of appointments. Not all of those have involved lawyers who have been experienced in bankruptcy practice.

So I don't think that would have to be a condition. I think it may well be a good idea to have such a screening panel, though.

Mr. Friend. If I may suggest, sir, there is the problem of the fact that we are talking about the 220 sitting judges who presumably, many of whom, would be candidates, and asking the lawyers who practice before them to comment on them, which presents those lawyers with some serious problems, and the judges with some serious problems. So for that reason I join with Mr. King in saying that if the bankruptcy bar is involved, it should not by any means be the only group.

Mr. Vihon. There already exists a model—not necessarily the same model, but at least one frame of reference—and that is the merit screening committee that is set up under the transitional provisions in title 4 of the public law where the judges whose terms run out during the transition period or there are vacancies and appointments have to be made through which merit screening panels those nominees' names are filtered.

Mr. Velde. Thank you.

Senator Heflin. In this transitional situation—and we are faced with the fact that we have got an election year on and the Congress will probably adjourn around the 1st of October, with this shortage of time and with a lot of legislation pending in order to be as least disruptive of the present system, what are the alternatives for de novo—first, do you think de novo for a transition is the best route; and, second, if you think that de novo is the proper transitional route, are there demarcations that can meet constitutional muster by in effect putting language that de novo will apply only to certain types of cases, generally using the language in the Supreme Court decision? Can you draw a line of demarcation between routine bankruptcy matters and those matters that would have constitutional infirmities?

Mr. King. I would simply have to say that if one were to rely on the Supreme Court's decision, it just could not take us any place, because what is routine and what is not routine, what is a public right and what is a private right, certainly are matters that do not come across clearly at all. I think an attempt at such demarcation would spawn a great deal of litigation in and of itself. I would refer the chairman to page 12 of the statement of the National Bankruptcy Conference where we did try to deal with the problem and offer a solution, to the extent that it might help. Part of it was what I suggested before.

A second part of it could well be, by giving to the present sitting judges the full panoply of powers that they presently have temporarily—temporarily only, that is, until the new judges take office—that if it is held with respect to any particular lawsuit that is tried by that judge, or if a contest is made as to the jurisdiction of a particular issue or lawsuit before that bankruptcy judge, that that case can be referred or can go up to the Federal district court where it can be tried by an article III judge. That could be built into the legislation.

Certainly there would be some litigation on that issue, but it would have the benefit, I think, (a) of reducing the litigation, and (b) reducing the length of time it would take to resolve it. If an appellate court, for example, a district court reviewing a decision of a bankruptcy judge during this interim period, during the transition period, said with respect to lawsuit A the bankruptcy judge did not have jurisdiction because of the *Marathon* decision, the district court could then try that lawsuit. If the bankruptcy judge were faced with a motion to dismiss and the bankruptcy judge felt that because of the *Marathon* decision he did not have jurisdiction, that case could then be sent to the Federal district court for determination.

I would venture to say that most of the cases under that kind of a system during the transition period would be tried in the bankruptcy court without dispute. I think that would be less onerous than setting up a de novo situation where you have a hearing here, then you go up and retry it, or it would go up there and be referred back here.

Mr. **Creel**. May I suggest, Senator, that once the decision is made that the result is going to be article III—and I think that is really the threshold problem—once that decision is made, then I think what happens in the interim will be more tolerantly looked at by the Supreme Court than if no decision is made. Once, philosophically, it is decided that bankruptcy judges ought to be article III judges and that bankruptcy court ought to be the place where everybody goes to solve their problems, then I think any reasonable mechanic, where a Federal district court is involved during a short transition period, will probably pass muster. Nobody knows that, but I think so, because it makes sense.

Senator **Heflin**. Well, that's sort of a nice and a perfect pattern to follow, but I think you are going to have some very legitimate reasons for article III judges—I mean, you are going to have to consider it, and it is going to have to be thought through. I don't think the time between now and October will really allow for that process to really develop, so on a temporary basis—I am just saying if that were to be true—on a temporary basis, what is the best system? Would you all agree that some form of de novo is the best temporary, without disrupting the present system?

Mr. **Creel**. I think without making the hard decision, anything else that is done on a short term or patchwork basis is going to spawn more litigation than all the rest of us have got time to handle. I don't think there is a solution to that. I think if Congress decides that it is too complex of a problem, that the problem is going to take a long time and a lot of study before deciding whether or not article III is or is not to be utilized for bankruptcy courts, then you may as well forget the bankruptcy system. I think that decision needs to be made fast. And while I realize it is a difficult decision, I don't think it is a complex decision—because you just don't have many options.

The only problem is transition, and that is a short-term problem, and we can live with that. If transition is 5 years, that's a problem; if transition is 6 months, it's not a problem.

But if the solution is not article III, no matter what you do, there will be an insurmountable problem, because the marketplace is not going to accept patchwork, and buyers aren't going to buy and lenders aren't going to lend and companies are going to die and that's the end of the story.

Senator **Heflin**. Do any of the rest of you have any opinions on the question if we go for a temporary—and I am speaking probably of a temporary situation, that Congress could come back in a lame-duck, which it probably will, but questionable if you will act between November and Christmas on this matter, unless the only real answer would be that if they do it would be that there would be no article III judges. That's my political feeling on the thing. If you determine to go to article III and get into the issue of the possibilities of categories of judges, knowing the legislative process in the House and the Senate, things don't move that fast; I mean, there is going to be some feeling that we ought to do something to pass it, then study it thoroughly. And I am looking right now as to what the temporary procedure ought to be, how it can be least disruptive of your present bankruptcy procedures.

Mr. **Friend**. Well, I believe that if the Attorney General does as he said he might do yesterday in another hearing, and would ask for a reasonable delay, and if Congress is dealing with this matter on the basis of facing the issue, which is the jurisdiction of the court, not whether they are article III judges or not—that may be the conclusion, but that is not the question.

If the Supreme Court feels that Congress is fairly dealing with the jurisdiction, then the Attorney General seems to think a delay could be obtained of some reasonable proportion which would retain the courts in their present status. The Court didn't want to be bothered with this until October 4 again: Don't call us back in and ask us again on this until after that, so we give you a stay till then. They are going to be back on October 4, and I suspect they would give a delay if Congress will work on the matter.

Senator **Heflin**. Well, an infirmity is like pregnancy, you know, you can't be a little bit pregnant. I don't know whether the court will go along with that or not, if they feel like it's an infirmity that has to be cured.

Mr. **Friend**. Well, it was an infirmity since October 1, 1979, and they said that all of those cases—we are not going to tamper with all those cases, we can't do that. And we know that things have to continue, so we won't do that. But we aren't going to let it go on forever, is essentially what they said. And that, and, as Professor King said, the *Glidden* case, seem to indicate that there is some precedent for temporary solutions while Congress works on the problem.

Senator **Heflin**. Well, anything else?

Mr. **Velde**. Just one, Mr. Chairman.

Senator **Heflin**. That's all right.

Mr. **Velde**. Would it be advisable, by either provision of law or a legislative history, report language or whatever, to identify a set of particular qualifications that these new article III judges might possess in terms of years of trial experience or whatever? It's sort of an unwritten rule that a district court judge must have been in practice for 15 years.

Do you see any advisability of having a similar set of qualifications or guidelines to those who are involved in the selection and confirmation process to follow in this instance?

Mr. King. I would have to leave that up to the members of the committee. The only thing that disturbs me about any such guidelines is they always eliminate law professors. [Laughter.]

Mr. Creel. Anything that would tend to make appointments inflexible I think would be difficult, but I don't see any real advantage or disadvantage.

Mr. Cook. Yes; consistent with the 1978 legislation, I think that the entrance requirements should be the same as they are for district court judges. We practitioners are primarily interested in having quality judges.

Mr. Creel. To go back to the last thing that we were talking about just for a moment, in furtherance of Mr. Friend's comments, we have all thought about the stay of the Supreme Court's order as perhaps a solution to the problem, as another temporary patch. But I suggest to the panel that the fact of the existence of the opinion as it is now stated leaves us chaos now. Judges are not acting uniformly around the country; cases are not being handled predictably around the country now. It is not going to get any better by October 4. Some judges are taking cases, some district judges are taking cases, some bankruptcy courts aren't taking cases at all, some bankruptcy judges are passing cases to the Federal district court. And nobody knows what to do. You can handle not knowing what to do for a few months, when there is hope around the corner, just like a debtor looking for a loan. But to handle that a year around the corner or two around the corner leaves a situation that is simply unworkable.

And it seems to me there must be one of two things happen immediately: Either the Senate and the House must give us some direction on which way they are going so we can feel like something is going to happen, or the Supreme Court needs to clarify its decision so we know what they are talking about, because we can't tell today.

Senator Heflin. Well, I don't believe you are going to get an ex parte advisory opinion. [Laughter.]

Mr. Creel. I don't think so either.

[Prepared statements and other submissions follow:]

Senator Heflin. We will recess. All of the statements of any of the witnesses will be printed in full in the record, and we will recess the hearing until 10 o'clock tomorrow.

[The hearing recessed at 4:35 p.m.]

[The following material was subsequently received for the record:]

PREPARED STATEMENT OF L. E. CREEL III

As an active practioner of bankruptcy law for over fifte years, and as a specialist in business reorganization matters for more than ten of those years, I offer some comments and suggestions pertaining to the effect of the *Marathon* decision, which comments and suggestions loosely follow the requests in Senator Dole's July 12th letter of invitation.

1. *Keep the current Congressional focus solely on the key jurisdictional issue.* The *Marathon* decision severely disrupts the Congressional structure for bankruptcy court jurisdiction. Something must be done immediately to make it possible for bankruptcy courts to function constitutionally. Otherwise, chaos will reign - and the predictability and uniformity of bankruptcy law (the essential philosophical purposes of law) will be lost. Therefore, all energies in the short time period permitted by the Supreme Court for remedial legislation must be exclusively directed toward an intelligent and workable solution to this perplexing jurisdictional problem. There is no time to chase the "rabbit trails" of other remedial bankruptcy legislation before the Congress.

2. *Avoid fascinating intellectual discussions of the nuances and intended meanings of the concurring Marathon opinions.* The perception of the effect of laws of the marketplace is more important than the actual effect. Regardless of the several interpretations of the various *Marathon* opinions which may be argued by astute and knowledgable professionals, the practical result of the *Marathon* opinion is that the power of the bankruptcy court is now severely eroded. Bankruptcy court

orders, in a conservative business climate, will now have questionable import where individual property and personal rights are involved.

This diminution in the power of the bankruptcy court will, in my opinion, become increasingly apparent in two immediate and crucial areas:

a. Smart lawyers, in attempts to best serve their clients' interests, will take advantage of the delays necessitated by clogged Federal District Court dockets, by requiring Federal District Court action on every conceivable issue.

b. Persons spending money on debtors' properties (use, purchase, lease, mortgage, improvement, etc.) will require the imprimatur of a Federal District Court's order before the first nickel is spent.

Those two areas alone will cause an unacceptable slowdown in a bankruptcy system which necessarily depends upon the expeditious resolution of critical business issues. The Federal District Courts simply do not have the time, staff or number of judges necessary to promptly handle the potential flood of bankruptcy matters; financially distressed companies and their creditors do not have the luxury of time to wait for answers to pressing issues. A slowdown in the process is unacceptable.

The marketplace, because of the Marathon decision, now perceives a major weakness in the bankruptcy system. That weakness will not be tolerated in commercial transactions. The "divergence of views between concurring opinions" is of little practical significance. The weakness must be absolutely removed; jurisdiction clarified and the bankruptcy machinery permitted to again function expeditiously.

3. October 5, 1982 may be the beginning of the "Rule of Pandora's Box." If the nine eminent Supreme Court Justices cannot unanimously agree on (i) the meaning and extent of coverage of three carefully worded and thought out Congressional sentences (Sections 1471(a), (b) and (c) of the Bankruptcy Code), and (ii) the result of the interplay between those three sentences and the Constitution, then how can hundreds of bankruptcy judges, thousands of lawyers and tens of thousands of parties be expected to function in business situations fraught with overwhelming economic pressures and survival emotions? Having no guidance from the Congress in this most sensitive area of law is simply unthinkable. The effect of the Marathon decision, should Congress fail to enact remedial legislation by October 4th is quite simply unpredictable, but certain, chaos. Congressional action, in whatever form, is essential. The failure to act is to open "Pandora's Box" and to leave business bankruptcy subject to the horrors of the unstructured creative thought of those thousands of lawyers and tens of thousands of parties.

4. Select the best of the few available alternatives.

The apparent alternatives are:

(a). Elevate bankruptcy judges to the full status of Article III Federal District Court Judges.

(b). Elevate bankruptcy judges to Article III judges by giving lifetime tenure, but salary and benefit packages something less than Federal District Court Judges.

(c). Choose one of the above alternatives (a) or (b) for some bankruptcy judges and use referees or special masters for the overflow work.

(d). Leave bankruptcy judges as they are, but extend to the Article I bankruptcy court specific jurisdictional grants involving "public" and "federal" rights only, with "private" rights (or "ancillary common law actions") to be routed to the Federal District Court.

(e). Go back to the old "summary/plenary" jurisdictional distinctions.

(f). Conbinations of the above.

My recommendation is alternative (c). Based upon the experience of the Administrative Office of the U. S. Courts, the Office of the U. S. Trustee and others, a sufficient but minimum number of bankruptcy judges should be appointed in each Federal District to efficiently handle the projected long-range case load for each such District. In determining the number of bankruptcy judges to be appointed for each District, the fact of the current downward business cycle with its concomitant increase in bankruptcy filings, should be weighed so that the fear of Justices White, Burger and Powell that we may have "large numbers of idle federal judges" will not become a reality.

To the extent that current increased caseloads justify additional help (if such be the case) then special masters can be used for the overflow pursuant to existing law.

The tenure of such bankruptcy judges must, constitutionally, be lifetime, so there is no Congressional discretion as to tenure. However, salary, retirement and other benefits can be matched with those available to other types of judges performing at similar levels, and can be at lesser levels than those presently enjoyed by Federal District Judges, thus preserving the present hierarchy.

The combination of Article III lifetime tenure, lesser financial benefits and a lesser number of appointments should satisfy all reasonable objections to bankruptcy judges being Article III judges. By conferring Article III power, the new bankruptcy judges will have the full power necessary to most efficiently and expeditiously handle the panoply of issues potentially involved in a complex business bankruptcy. If the complex can be effectively administered by the system, then the simple becomes simpler. Therefore, the system should be workable. No better solution is available. Any delegation of power less than Article III power is not enough to get the job best done.

Assuming Congress choose, for some reason that I cannot perceive, not to make bankruptcy judges Article III judges, then I strongly recommend Alternative (d)., with a careful and detailed definition (with categories and examples) of "federal" and "public" rights, on the one hand, and "private" and "ancillary common law" rights on the other, so that the old vagueries of the "summary/plenary" dichotomy will not be resurrected. Further, the old "consent to jurisdiction" concepts should be re-established.

One of the few significant benefits that I perceive in the new Bankruptcy Code is the elimination of the time and money wasting arguments over summary/plenary jurisdiction.

As stated earlier, perception of the effect of law is the essential truth in the market place. The Bankruptcy Code's grant of all-pervasive jurisdiction to the bankruptcy courts substantially changed the image and influence of the bankruptcy court. The mere existence of such broader jurisdiction has eliminated the previous tendency to be litigious over the bankruptcy courts' power and has focused the energies of the litigants more directly upon the merits of their disputes.

To return now to the shadowy jungle of "summary/plenary" jurisdiction is a waste. The efforts and opinions of the many who fashioned the Bankruptcy Code over ten years or more of an intense legislative process should be more respected than to permit a summary reversion to one of the principal evils inherent in the old Bankruptcy Act.

5. Transition is the challenging problem. If at a point in time, the presently sitting bankruptcy judges do not have constitutional power to act, and if new Article III judges have not, at that time, been effectively appointed and qualified, what is to be done until the mess is straightened out?

A "folding in" of present bankruptcy judges is not an appropriate solution for many reasons.

The appointive process, just because of the numbers and procedures involved is not likely to occur by October 4, 1982.

Only three alternatives seem available:

(a). Have the Federal District generally exercise, in some way, the "essential attributes" of judicial power during the transition period.

(b). Fashion a temporary jurisdictional structure that permits the bankruptcy court to continue to resolve "federal" and "public" disputes, while reserving to the Federal District Court the "private" or "ancillary common law" disputes.

(c). Persuade the Supreme Court to continue the stay of the effect of its Marathon decision until the appointment process is completed.

Alternative (c). cannot be depended upon and alternative (b). seems unnecessarily disruptive and complicated. Alternative (a). seems the better of the three.

My recommendation is that, during the transition only, all parties to all disputes be given the right of "de novo" appeal to the Federal District Court, under which appellate system, any appealed decision of the Article I bankruptcy judge is given no weight.

As a practical matter, few decisions are appealed and, therefore, the effect on the reorganization process of such an appellate right, for the months (not years) involved in the appointment procedure should be minimal.

The plurality opinion suggests a pp. 30-37 that such an appellate review right may make the exercise of jurisdiction by an Article I judge constitutional, because, in the final analysis, the binding exercise of the "essential attributes" of the judicial power will rest with a Federal District Judge who can hear new evidence and make his own rulings, completely independent of and separate from any action of the Article I bankruptcy judge. (See also pp. 8-11 of Justice White's dissenting opinion).

Such a system of review should, however, be short-term only, for its logical extension is to encourage that all disputed issues be tried twice, an essentially inefficient waste of judicial time and taxpayer money.

An addition or alternative to "de novo" appeal (as Congress determines necessary to insure constitutionality) is the requirement that all issues which result in bankruptcy court orders be certified to the Federal District Court with a requested form of order. In this way the actual entry of the order, based upon an existing record, or new evidence if needed, is performed by an Article III judge, and the problem is resolved.

As additional mechanics to support the constitutionality of an interim jurisdictional structure, two further procedures may be implemented: first, any party asserting "private" or "ancillary common law" rights may be given immediate access to the Federal District Court system and, second, bankruptcy judges may be given the power to determine, as a threshold issue, whether the basic thrust of a litigant's complaint is "private" or "public", and, if "private", may immediately transfer the matter to the Federal District Court's docket.

Whatever means, or combination of means is selected for administering matters during the transition period, the means should be merely temporary, for such means are necessarily devisive and expensive. More importantly, fragmentation of issues among several courts tends to obfuscate the primary purpose of business bankruptcy proceedings, viz., the expeditious pursuit of either reorganization or liquidation within one arena where all involved parties may most knowledgeably and efficiently operate.

In summary and conclusion then I recommend:

1. Do not divert any attention from the key issue of jurisdiction raised by Marathon.
2. Do not get involved in a discussion of irrelevant issues raised by the Marathon opinions.
3. Assume §241(a) is unconstitutional in its delegation of jurisdiction to Article I bankruptcy judges.

4. Make some bankruptcy judges Article III judges with:
   a. lifetime tenure, and
   b. a package of benefits of lesser value than Federal District Judges, using special masters for any overflow.
5. Until the new appointment procedure is completed, use the ultimate Article III power of the Federal District Judges in all disputes (either by use of a new "de novo" appellate process or the certification process, or the other suggestions utilizing the Federal District Court's Article III jurisdictional power, or some or all of those or other techniques).

Respectfully submitted,

LE Creel III

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75 copies - Committee on the Judiciary,
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July 19, 1982

L. E. Creel, III, Esq.
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Dear Ed:

I understand that you have been asked to testify before the Senate Judiciary Committee during the hearings it will conduct later this week in deliberation over the course it may follow in the wake of the Supreme Court's landmark decision In the Matter of Northern Pipeline Construction Co. v. Marathon Pipeline Company and the United States.

As chairman of the American Bar Association's Business Bankruptcy Committee's Subcommittee on New and Pending Legislation, and as a principal of a firm which practices almost exclusively in the area of bankruptcy and reorganization law, and which owes its existence to the standing and experience of Norman H. Nachman, our senior partner and one of bankruptcy's most distinguished practitioners since the formation of his practice in 1947, I have received letters from many prominent members of our bar in response to the Supreme Court's decision, urging the reconstitution of the bankruptcy court as an Article III court. Given what appears to be the almost total unanimity of opinion held by practitioners in this specialized area of the law, we would wish to impose upon you to act as our spokesman in expressing this position to the distinguished members of the Senate Judiciary Committee which now labors over this difficult and most important problem.

Rather than attempting to set forth fully this consensus opinion which has been expressed to me and, doubtless, countless other bankruptcy practitioners, I have taken the liberty of attaching but a few of those letters for your review and, hopefully, presentation to the Senate. As expressed best by these prominent bankruptcy practitioners, the alternative to the reconstitution of the bankruptcy court as an Article III court spells the most undesirable return to a bifurcation of bankruptcy jurisdiction between the district court and the bankruptcy court. Whether this bifurcation takes the form of a return to the dichotomy between the summary jurisdiction and plenary jurisdiction of the bankruptcy court found under the former Bankruptcy Act which was repealed by the Bankruptcy Reform Act of 1978 or is, instead, premised upon a referral of all common and state law actions directly to the district court, leaving to the specialized bankruptcy court mere administrative functions, it appears that such a digression would make present day bankruptcy practice and the administration of bankruptcy law wholly unresponsive to the demands of modern bankruptcy practice and, if I may be so bold, to the needs of the American consumer and American business in these difficult and trying economic times.

As you know well, the great thrust of the Bankruptcy Reform Act of 1978 was to consolidate the necessarily comprehensive jurisdiction of bankruptcy law and its administration in a single court, thereby avoiding the exceeding costly and wholly unproductive time previously expended by the Bench and Bar alike to disputes concerning the jurisdiction of the bankruptcy court. This was intended and, in fact, has saved that time and expense for the trial and adjudication of matters at the heart of the administration of bankruptcy law. Suffice it to say that any severance of the jurisdiction now enjoyed by the bankruptcy court will render the productive efforts of Congress in enacting the Bankruptcy Reform Act of 1978 fruitless and meaningless. It is fair, I think, to assume that the district courts, because of the demands of their ever-increasing case load, are simply not equipped presently to meet the demands of current bankruptcy practice or to satisfy the needs which Congress believed were required to be satisfied in enacting the present Bankruptcy Code.

Perhaps more importantly, given the plurality decision of the Supreme Court, it is not at all certain that Congress can effectively bifurcate the present jurisdiction of the bankruptcy court in a manner which will withstand further constitutional review and scrutiny. It would, therefore, seem that the only real alternative is the constitution of the bankruptcy court as an Article III court. This does not mean, however, that, should the bankruptcy court be elevated to Article III status, the judges which may hereafter be appointed to that court need attain the same status and realize the same benefits that our United States district court judges now hold. Furthermore, provided that the right of de novo appeal from bankruptcy judges' decisions is granted to bankruptcy litigants and the present bankruptcy judges' tenure and compensation is fixed during the transition period between the constitution of the court and the appointment of life-tenured judges to that court, the President, with the advice and consent of the Senate, may embark on the appointment of judges to that court without being pressured to complete that process prior to the expiration of the Supreme Court's stay of execution of the Marathon decision on October 4, 1982.

Finally, in the interests of meeting the very short deadline imposed by the Supreme Court, and so as to permit Congress to deliberate fully over the many technical amendments and special interest bankruptcy bills which are pending in both the House and Senate, I would urge, as do many of our

L. E. Creel, III, Esq.
July 19, 1982
Page Two

fellow bankruptcy practitioners, that the efforts to satisfy the mandate of the Supreme Court be dealt with separate and apart from the efforts which must necessarily be devoted to this other important bankruptcy legislation.

I hope and trust that by this request, I have not imposed too greatly on your good offices, and that you will agree to lend your very highly regarded and most effective voice to the bankruptcy bar and bench.

Again, many thanks.

Respectfully,

LEWIS S. ROSENBLOOM

LSR/bjm

cc: Timothy J. Curtin, Esq.
H. Lewis Goodman, Esq.
Kenneth N. Klee, Esq.
Ronald M. Martin, Esq.
Robin E. Phelan, Esq., Chairman, ABA Business Bankruptcy Committee, Tax Subcommittee
William J. Rochelle, Jr., Esq.
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July 15, 1982

Leonard M. Rosen
Wachtell, Lipton, Rosen & Katz
299 Park Avenue
New York, NY 10171

Re: Marathon Pipeline Case

Dear Mr. Rosen:

I believe it is virtually unanimous opinion of bankruptcy practitioners in our area that Congress should restructure the Bankruptcy Code to make Bankruptcy Courts Article III Courts. Certainly one of the major reforms brought about by the Bankruptcy Code was the expanded jurisdiction granted to Bankruptcy Courts and the concomitant elimination of the cumbersome and wasteful concept of summary versus plenary jurisdiction. I believe our subcommittee, and the ABA Business Bankruptcy Committee as a whole, should take a strong stand favoring the continuation of the expanded jurisdiction.

Very truly yours,

SCHMIDT, HOWLETT, VAN'T HOF,
SNELL & VANA

By: Timothy J. Curtin

TJC:cdj
cc: Lewis S. Rosenbloom ✓
Robert W. Sawdey
Robin E. Phelan

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July 12, 1982

Lewis S. Rosenbloom, Esq.
Nachman, Munitz & Sweig, Ltd.
115 South LaSalle Street
Chicago, Illinois 60603

Re: Business Bankruptcy Committee
American Bar Association

Dear Mr. Rosenbloom:

Robin Phelan's letter jogged my intention to suggest to the Committee the need for the creation of an *ad hoc* committee to deal with pending legislation or to propose legislation, in light of the Supreme Court's decision in the *Marathon Pipeline* case.

I concur with Robin Phelan's personal opinion that the Bankruptcy Court and judges should be an Article III court. Otherwise, I fear that we will regress to the old summary and plenary dichotomy under the 1898 Act.

Sincerely yours,

H. Lewis Goodman

HLG:am

cc: Herman B. Glatt, P.C.

July 12, 1982

Lewis S. Rosenbloom, Esq.
Nachman, Munitz & Schweig, Ltd.
115 South LaSalle Street
Chicago, Illinois 60603

Re: Article III Bankruptcy Courts

Dear Lewis:

As you are aware, the Supreme Court of the United States recently decided the case Northern Pipeline Construction Co. v. Marathon Pipe Line Co., ___ U.S. ___ (1982) holding unconstitutional the broad grant of jurisdiction to the bankruptcy courts contained in § 241(a) of the Bankruptcy Reform Act of 1978. The Court reasoned that the protections of Article III, Section 1 of the United States Constitution required judges exercising the jurisdiction conferred by § 241(a) to hold their offices during good behavior and to receive compensation which could not be diminished during their continuance in office. The Court gave Congress until October 4, 1982 to enact curative legislation.

Congress will be required to make a fundamental choice in adopting curative legislation. Congress must either bifurcate the bankruptcy court's jurisdiction, granting some jurisdiction to Article III tenured judges and other jurisdiction to Article I bankruptcy judges, or Congress must vest all jurisdiction in Article III courts.

It is vitally important that Congress confer a single broad grant of jurisdiction on courts comprised of Article III judges. The entire emphasis of bankrutpcy reform accomplished in the 1978 Act was to consolidate bankruptcy jurisdiction in the bankruptcy courts. Prior to the 1978 Act, countless hours of judicial time and resources were wasted litigating issues of jurisdiction. Should Congress return to bifurcated jurisdiction, virtually all of the efficiencies accomplished by the 1978 Act will be lost. Congress cannot possibly draw a bright line that will bifurcate jurisdiction cleanly and be assured of withstanding constitutional scrutiny.

As a policy matter, separate Article III bankruptcy courts will enhance administration of justice in the United States. Bankruptcy cases frequently involve complicated issues that require the adjudicatory skills of specialized judges. In many instances, time is of the essence. Unless judges make decisions quickly and correctly, reorganization efforts will fail. Specialized bankruptcy judges with plenary jurisdiction are necessary to render justice in those circumstances. Granting such judges Article III status is likely to improve the caliber of judges appointed.

Separate Article III bankruptcy courts will benefit the Judiciary generally. When bankruptcy judges are accorded Article III status, they will be able to be designated and assigned to sit on other Article III courts such as the District Courts and Courts of Appeals should the need arise. In addition, Article III bankruptcy judges will add diversity and perspective to the Judicial Conference, thereby eliminating the Conference's unfamiliarity with bankruptcy problems. Finally, separate Article III bankruptcy courts are essential to reduce the crushing burden that otherwise will be placed on the District Courts if Congress fails to enact curative legislation by October 4, 1982. See 28 U.S.C. § 1334 (Supp. IV 1980).

I am sure that other members of the Bar join with me in urging you to exert every effort possible to aid congressional enactment of an Article III bankruptcy court.

Very truly yours,

Kenneth N. Klee

KNK:kim
/1/8

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SPECIAL COUNSEL

July 13, 1982

Lewis S. Rosenbloom
115 South LaSalle St.
Chicago, IL 60603

Dear Mr. Rosenbloom:

As a member of the ABA Business Bankruptcy Committee, I wish to add another voice agreeing that Bankruptcy Court Judges should be Article III Judges.

If you have any questions please do not hesitate to contact me.

Yours very truly,

Ronald M. Martin

RMM/bkm

cc: Robin E. Phelan
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July 6, 1982

COPY

TO: ALL MEMBERS OF THE BANKRUPTCY TAX SUB-COMMITTEE OF THE BUSINESS BANKRUPTCY COMMITTEE OF THE AMERICAN BAR ASSOCIATION

RE: Marathon Pipeline Case

Gentlemen:

You will find enclosed herewith a copy of a letter of June 28, 1982 from Lewis Rosenbloom regarding the Marathon case. My personal opinion is that the Bankruptcy judges should be Article III judges. Please forward your comments directly to Lewis Rosenbloom.

Sincerely,

Robin E. Phelan

REP/db

Enclosure

cc: Lewis Rosenbloom - w/o enclosure

---

*ADMITTED ONLY IN STATES OTHER THAN TEXAS

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July 9, 1982

Mr. Lewis S. Rosenbloom
Nachman, Munitz & Sweig, Ltd.
115 South LaSalle Street
Chicago, Illinois 60603

Dear Lewis:

At the suggestion of Robin Phelan, I am communicating directly to you my strong belief that the Congress should make Bankruptcy Judges Article III judges.

Very sincerely yours,

Bill

William J. Rochelle, Jr.

WJR Jr/nt

cc-Mr. Robin Phelan

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July 6, 1982

Lewis S. Rosenbloom, Esq.
Nachman, Munitz & Sweig, Ltd.
115 South LaSalle Street
Chicago, Illinois 60603

Re: ABA Business Bankruptcy Committee
New and Pending Legislation SubCommittee

Dear Lewis:

Regarding your letter of June 28, 1982, please put me on record as favoring H.R. 6109 which constitutes the bankruptcy court as an Article III court. It seems to me that this would be the simplest and best way to proceed and that attempting to reduce the jurisdiction of the court will only lead to unnecessary litigation and further constitutional questions.

Best regards.

Sincerely,

LMR:nja

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PAUL D. RUBNER
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TELEPHONE 303-321-1450

July 15, 1982

Mr. Lewis Rosenblum
Nachman, Munitz and Swige, Ltd.
115 South LaSalle Street
Chicago, IL 60603

Dear Mr. Rosenblum:

In response to Robin E. Phelan's letter dated July 6, 1982, the purpose of this letter is to add my support to those who would advocate making bankruptcy judges Article III judges as a way of dealing with the problem created by the decision in Northern Pipeline Construction Co. v. Marathon Pipeline Co.

Being mindfull of the pressures and tension that existed between the district court judges and bankruptcy judges before the compromise which was contained in the Code was struck, it may be that the Article III judges which are constituted in the Bankruptcy Court will not have exactly the same salary and perquisites of office as existing District Court judges. Indeed, the plurality in the Marathon decision suggested this approach by quoting from Paul Miskin's letter submitted to the House Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary.

What I am and continue to be alarmed about is the possibility that with the pressures to resurrect the Bankruptcy Code will come congressional attempts to engraft on to any corrective legislation various amendments which enbody proposals presently pending before Congress so that they are pushed through without appropriate consideration as to their impact. Review of S. 2000 and Senate Report No. 97-446 makes clear these are very controversial matters. I believe that every effort should be undertaken to meet the objections of the Supreme Court on some kind of a consensus basis between those who would advance the interests of debtors and those who advance the interests of creditors in an active discouragement to those who might use this circumstance as an opportunity to rapidly advance proposals that should be more thoroughly considered.

My personal perference is to constitute bankruptcy judges as Article III judges along the lines suggested in Mr. Miskin's letter quoted in the plurality opinion. In this way the Supreme Court's objections would be met, the political realities served by assigning lower pay scales and different perquisites of office and one cornerstone of the Code's efficacy in reorganizations (wide judisdiction) would be preserved.

Very truly yours,

Paul D. Rubner

PDR/sjs

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July 12, 1982

MR. LEWIS S. ROSENBLOOM
Nachman, Munitz & Sweig, Ltd.
115 South LaSalle Street
Chicago, Illinois 60603

Re: Marathon Pipeline case

Dear Mr. Rosenbloom:

I am a member of the American Bar Association's Business Bankruptcy Committee (Sections 361-364 Subcommittee). I have received from Robin E. Phelan a copy of your letter of June 28, 1982, regarding your position in reference to the Supreme Court's recent decision in the Marathon Pipeline Oil Company case. Personally, I vigorously support the proposition of reconstituting the bankruptcy court so as to clearly make it an Article III court. Moreover, I know of no bankruptcy practitioners here in the Western District of Michigan who do not fully share my position.

Consequently, it is my hope that the ultimate position of the American Bar Association in this matter will be to support making the bankruptcy court an Article III court. A return to the old "circus" of summary vs. plenary juridiction in bankruptcy matters would, in my judgment and in the judgment of numerous bankruptcy counsel with whom I have discussed this matter, be an error of major proportions. Should you wish that I detail further my position in regard to this matter, please feel free to advise me accordingly.

Very truly yours,

Robert W. Sawdey

RWS:11

cc: Robin E. Phelan
Timothy J. Curtin
Hon. Laurence E. Howard
Hon. David E. Nims, Jr.

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July 15, 1982

Lewis S. Rosenbloom, Esquire
NACHMAN, MUNITZ & SWEIG, LTD.
115 South LaSalle Street
Chicago, Illinois 60603

In Re: BUSINESS BANKRUPTCY COMMITTEE OF THE AMERICAN BAR ASSOCIATION

Dear Mr. Rosenbloom:

I have your memo to all members of the Subcommittee of the ABA Business Bankruptcy Committee and as a practitioner of some twelve years in bankruptcy related matters, it is my considered opinion that bankruptcy administration would be best served by constituting the court as an Article III court. We have a particular problem here in Maine in that there is a recommendation by the Administrative Office of the United States Courts that the District of Maine lose one of its two bankruptcy judges. I would not like to see the constitution of the bankruptcy court as an Article III court result in the loss of either of our judges here in Maine. I do, however, believe that elevation of the Court to an Article III court is consistent with retaining the two bankruptcy judges in Maine. I am submitting your memo to the Chairman of the Maine State Bar Association Section on Bankruptcy and Reorganiation, P. Benjamin Zuckerman, Esquire, in anticipation that he will confirm that my views represent the views of the Section.

Yours truly,

Gregory A. Tselikis

GAT:tmd

cc: P. Benjamin Zuckerman, Esquire

PREPARED STATEMENT OF LAWRENCE KING

OF

NATIONAL BANKRUPTCY CONFERENCE

Before the
Subcommittee on Courts
Committee on the Judiciary
United States Senate

July 22, 1982

The National Bankruptcy Conference ("NBC") is a nonprofit unincorporated organization composed of representatives of different groups who are interested in the administration of bankruptcy law, including bankruptcy judges, full-time professors of law and practicing attorneys who specialize in this area. There are 58 full members and 11 associate members; all areas of the country are represented among the membership. From about 1932 the conference has devoted itself to the improvement of the bankruptcy law and its administration. Since the filing of the Report of the Commission on the Bankruptcy Laws of the United States in 1973, the Conference has devoted itself to studying the Report and all the bills following it introduced in both the House and Senate, and worked for the passage of an Act which would substantially improve and reform the former law.

The NBC has continued its study of the operation of the bankruptcy laws following enactment of the 1978 Act and has reviewed the Statute's effectiveness both in substantive and procedural areas. We appreciate the opportunity to represent our views in these hearings on the bankruptcy courts in light of the Supreme

Court's decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., decided on June 28, 1982.

Prior Hearings

The Judiciary Committee's Subcommittee on Civil and Constitutional Rights held extensive hearings in the 94th and 95th Congresses on the subject of bankruptcy reform. The hearings in the 95th Congress in 1977 concentrated exclusively on the court and administrative structure for bankruptcy cases. The hearings occupied three days; 22 witnesses testified; the hearing record covers 261 pages. Those hearings may have been the most comprehensive and extensive hearings ever conducted on the bankruptcy court and administrative structure. The record is very complete. Every point of view was represented; every segment of the legal community, including the bench, the bar, and academia, both within and without the bankruptcy field was represented. Except for two developments since those hearings, which we will discuss below, the hearing record there could well be all that would be needed for this Subcommittee and the Congress to respond to the Marathon Pipeline case. Thus, the NBC suggests that this Subcommittee make the hearing record of the 1977 hearings part of the record for these hearings.

Based on the 94th and 95th Congresses' hearings, the Judiciary Committee and the Congress concluded that one of the most important aspects of an effective bankruptcy court system was the broad jurisdiction granted by the 1978 Act. The delays, expense and wasteful litigation caused by the limited jurisdiction of the bankruptcy courts under the former Bankruptcy Act were an

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unwarranted burden on debtors and creditors alike in attempting to reorganize businesses or liquidate assets and distribute them to creditors. As the Subcommittee on Civil and Constitutional Rights concluded, "The limited jurisdiction of the bankruptcy court is the most significant problem facing the bankruptcy courts and litigants today." House Judiciary Comm. Print No. 13, 95th Cong., 2d Sess., at 2 (1978). The NBC has long supported the concept of pervasive jurisdiction for the bankruptcy courts, and continues to do so.

The other very important aspect of an effective bankruptcy court system is the independence and prestige of the court. Prestige is important to attract well-qualified individuals to serve on the courts and to improve the public perception that justice is being dispensed well and fairly. The court system under the former Bankruptcy Act failed this test, because bankruptcy referees were looked upon as assistants to district judges. An outstanding lawyer does not typically aspire to be someone else's assistant. Moreover, there was a general perception among the bar that the bankruptcy courts were not "real" courts, largely because of their subordinate or dependent position in the federal judiciary. The Judiciary Committee concluded in 1977 that an independent Article III bankruptcy court system was the preferred solution to this problem, but the Congress ultimately decided on something less: A court system that was functionally independent of the district courts, with judges appointed by the President with the advice and consent of the Senate for 14-year terms. The NBC strongly supported the Article III concept as the best solution, but acknowledged that the reduced court system ultimately enacted would be a long step toward an independent, prestigious bankruptcy court.

The two developments that have occurred since the 1977 hearings, we believe, validate the Judiciary Committee's and the House's decision in 1977 and 1978 in favor of an Article III court system. The first, of course, is the Supreme Court's Marathon Pipeline decision. The second development is our experience with the functioning of the bankruptcy court system under the 1978 legislation for the past two and one-half years. While the NBC believes that it is still too early to make final conclusions on the success of the court system established in 1978, we are of the view that the experience to date indicates that the new court system certainly works better than its predecessor, and that it has largely met the goals that it was created to accomplish. We shall address the impact of each of these developments separately.

Marathon Pipe Line

It was unfortunate that the Supreme Court was unable to agree on a majority opinion in Marathon Pipe Line. It leaves the question of the limits of Congress' power under Article I and Article III still in great doubt. It also can tempt all of us to play the game of attempting to determine just how much the two concurring justices would be willing to permit in a non-Article III bankruptcy court system. Playing such a game is unwise and perhaps futile. It diverts attention from this Committee's and the Congress' responsibility to make its own determination of what the Constitution requires. And, relying as it does on personalities, it runs the risk that future changes in court personnel will render invalid the predictions that are made. The NBC believes that playing this game is not the correct approach in fashioning a legislative response to the court's decision, either from the standpoint of the bankruptcy system or of the constitutional process. Given the availability of one clearly constitutional option that comports with the goals that the Committee and the Congress have sought to achieve in the bankruptcy area, we believe that the Committee's choice is made easier: An Article III bankruptcy court should be the legislative response.

Marathon Pipe Line is at least clear that some jurisdictional and enforcement limitations will be required on any bankruptcy court that is not an Article III court. The Supreme Court did not help us much in determining the nature of those limitations, and we would not know the precise contours of those limitations without extensive additional litigation. But we do know from the decision that a non-Article III court cannot be given jurisdiction over the causes of action created solely by state law; and this puts beyond the jurisdiction of a non-Article III bankruptcy court not only the relatively substantial contract cause of action involved in Marathon Pipe Line, but also all the routine collection suits (e.g. collection of the debtor's accounts receivable) involving liquidation of property of the estate. The inability of the bankruptcy court under the old Act to exercise jurisdiction over this type of claim was one of the frequently cited causes for delay and ineffeciency in the operation of the former system.

We can be relatively certain that any line that the Congress attempts to draw to limit the jurisdiction or powers of a non-Article III bankruptcy court will be vigorously and frequently challenged by lawyers as being still constitutionally impermissible under the Marathon Pipe Line decision. And, if congress draws jurisdictional lines that are similar to those of the old court system under the Bankruptcy Act, we will have in addition to the constitutional litigation, all the "summary/plenary" litigation, the elimination of which was one of the major reform goals of the 1978 Statute. Predictably, it will take years of wasteful lawsuits merely to get back to where we started in 1978.

Experience With The New Court System

The experience under the new bankruptcy court system during the past 2-1/2 years indicates that generally the expanded jurisdiction works well. There continues to be some litigation over the bankruptcy court's jurisdiction, but the litigation is at the peripheries and some of the problems now identified can be easily resolved. They are no longer over the core of the bankruptcy process. These core matters include the collection of assets and the exercise of the bankruptcy avoiding powers as well as the matters relating to the debtor's exemptions and discharge, and the allowability of claims. The elimination of most litigation over jurisdiction has simplified greatly the handling of the bankruptcy cases for the courts and for the litigants. It saved significant judicial and economic resources. Thus, the expansion of jurisdiction under the 1978 Act appears to be working well and the NBC believes it should be maintained.

Summary

As stated before, the two developments that have occurred since the 1977 hearings have only served to reinforce the NBC's view that the bankruptcy courts must be prestigious courts with broad jurisdiction and powers to handle all matters related to a bankruptcy case. They have also reinforced the NBC's view that the surest, safest, and most effective means of accomplishing these goals is to create independent Article III bankruptcy courts. Any other solution would require uncertain limitations on jurisdiction, productive of much litigation, and would diminish the prestige and importance of the bankruptcy courts.

The NBC has previously supported proposals for the handling of bankruptcy cases in a special division of the district court with Article III judges appointed specifically to sit in that division. As long as there were some structural features of that system that would insure that the bankruptcy division would not once again become a stepchild of the remainder of the district court system, the NBC would continue to support that proposal. Thus, the NBC's support for an Article III bankruptcy court does not per se require that the court system be established completely independent of the district courts.

However, the NBC strongly opposes any system whereby the bulk of the jurisdiction of the bankruptcy courts would be placed in the district courts, with magistrates or referees in bankruptcy handling those matters that Marathon Pipe Line seems to indicate could be handled by an adjunct to the district courts. Such a proposal would create the same jurisdictional litigation and delay and would demean the office of the bankruptcy judge so as to make the bankruptcy court system not only a stepchild, but, we would anticipate, a crippled stepchild as well.

Appeals

In addition to the basic form of the court system, there are other issues that this Committee should consider in fashioning a legislative response to Marathon Pipe Line. The Committee should address the issues of appeals. The current law provides for appeals from the bankruptcy court to the district court, unless the parties agree to an appeal directly to the court of appeals or unless the circuit council has directed the establishment of bankruptcy appellate panels. To date, two circuits have provided for the establishment of panels, the First and the Ninth Circuits. The First Circuit has done so circuit-wide, with the exception of Puerto Rico. The Ninth Circuit originally started with a pilot program involving only the Central District of California and the District of Arizona. It has since been expanded to include all of California, Arizona, and Nevada. It has worked so successfully in the Ninth Circuit that serious consideration is being given to expanding it circuitwide (except for Hawaii, Guam, and Alaska).

The NBC recommends that the panel system be continued in effect under a reconstituted Article III bankruptcy court system. Appeals to the district courts would be relatively meaningless, because they would be appeals from a single Article III trial judge to another single Article III trial judge. The NBC would retain and expand the panel system (an appeal from a panel decision would lie to the court of appeals)giving the circuit councils the alternative of permitting direct appeals to the court of appeals in lieu of the panel, and giving the litigants the same alternative they have now of permitting appeals direct to the court of appeals with the consent of the parties.

Powers of the Court

The bankruptcy courts should be granted the full powers of a federal court. There are currently limitations imposed by statute on the bankruptcy courts' contempt and injunctive powers. These were imposed in response to a perception that a non-Article III court could not exercise all the contempt and injunctive powers of an Article III court. If the Congress creates an Article III court, these relatively minor limitations should be removed. Also, no other limitations should be inserted. Under the 1978 Act, the bankruptcy court was granted powers under section 105 of title 11 to enforce its orders, was granted powers under section 1481 of title 28 of a court of law, equity, and admiralty, was granted habeas corpus power under section 2256 of title 28, and was granted the power under section 1480 of title 28 to hold jury trials, among other things. All of these powers should be retained in order to have an effective, prestigious bankruptcy court.

Judicial Governance Process

Bankruptcy judges should be given a role in the judicial governance process, presumably through the Judicial Conference, to participate in the budgeting process of the federal courts. This becomes important to prevent the bankruptcy courts from being relegated to second class status as a result of inadequate budget requests to the Congress from the Judicial Conference. Without sufficient participation by the bankruptcy judges in the budgeting and other governance processes, there may be an adverse effect on the status and prestige granted by Congress to the bankruptcy courts.

Staffing

The bankruptcy judges should continue to be provided with full support staff, including clerks, secretaries, law clerks, and court reporters. Bailiffs are probably unnecessary, however. Since the 1978 Act, there has been a serious problem in many districts over court reporters. In spite of the 1978 legislation that the Judicial Conference provide similar court reporting services to bankruptcy courts as to district courts, the Judicial Conference has construed the law in a way that permits court reporting services to be provided on a contract basis by large reporting firms, rather than by individual court reporters appointed by the judge, as is the practice in the district court. The quality and continuity of the reporting services have suffered accordingly. Congress should correct this deficiency.

Appointment and Assignment of Judges

Although the NBC takes no position on the questions of salaries, of filling of vacancies, of designation and assignment of bankruptcy judges to other Article III courts and of other Article III judges to bankruptcy courts, or of requiring future judgeship vacancies to be reauthorized, we raise these issues for the Committee's consideration. The NBC recommends only that the salaries be sufficient to comport with the prestige of an Article III court, and the Committee may wish to consider whether the designation and assignment and vacancy provisions should be designed to expedite federal judicial business and to provide flexibility in the use of federal judges as caseloads change in different segments of the federal judiciary.

Transition Period

Creation of a new court system will require careful structuring of a transition system from the current court to the new court. Buckley v Valeo, 424 U.S. 1 (1976), invalidating portions of the Federal Election Act, indicates that Congress may not fold-in incumbents into an Article III court. Article III judges should be appointed by the President with the advice and consent of the Senate. In addition, the number of judges needed is not yet known. The Judicial Conference is currently studying and is scheduled to report soon to Congress on the number of bankruptcy judges that will be needed under the revised substantive law and jurisdictional provisions of the 1978 Act. Under section 406(b) of the 1978 Act, that report is due by January 3, 1983. For these reasons, it will take time to create the necessary judgeships and to complete the appointments process. The NBC cannot estimate how long.

Nevertheless, Congress should act now to establish a new Article III court system immediately, with a "transition period" while the new judges are being selected. During that period Congress could permit the current bankruptcy judges to sit on the new court, as apparently permitted under Glidden Co. v. Zdanok, 370 U.S. 530 (1962), and noted in this Committee's 1977 Report, H.R. Rep. No. 95-595, 95th Cong., 1st Sess., at 288 (1977). See Metlakatla Indian Comm. v. Egan, 363 U.S. 555 (1960)(Alaska courts). While it is not entirely clear, it would seem arguably constitutional for untenured temporary judges to exercise the so-called Article III jurisdiction even though Marathon Pipe Line holds that as judges of a permanent court they cannot. Mr. Justice Harlan's plurality opinion in Glidden suggested a distinction based on such temporariness and the Marathon Pipe Line decision, which stays the effect of its judgment, itself suggests that such a distinction can be made. The NBC favors the adoption of this position, to permit the current bankruptcy judges full authority during a short (1 to 2 years) "transition period," with some statutory provisions permitting transfer to the district courts of any lawsuit as to which it was held that the bankruptcy courts as so manned by temporary judges could not constitutionally exercise jurisdiction during transition. There will be litigation over this, but such litigation during transition may well be inevitable. Once the judges of the new courts are in office lawsuits that had not yet gone to trial could be transferred back from the district courts to the bankruptcy courts for all further proceedings.

Alternately, the district courts could be given stronger review powers during the transition period, such as the authority to take new evidence or to hear a matter de novo on appeal from a bankruptcy judge's ruling, in any lawsuit over which the bankruptcy courts during transition could not otherwise exercise jurisdiction. Such a procedure, although admittedly having its inefficiencies, would permit continuation, to a considerable extent, of the present system during transition, so as not to disrupt too greatly the handling of bankruptcy and rehabilitation cases.

The Urgent Need For a Prompt Legislative Response to Marathon Pipeline

It seems reasonably clear that absent congressional action by October 4, 1982, the existing bankruptcy courts would then lack jurisdiction to determine any disputed matters and very arguably would lack jurisdiction to do anything, even to accept bankruptcy and reorganization petitions for filing. Arguments can be made both ways as to the impact of Marathon Pipe Line on the district court's bankruptcy jurisdiction. Without remedial legislation virtually nothing about how the bankruptcy system will work, if at all, can be stated with any certainty.

Such potential chaos could not occur at a less opportune time. Our country has been in a period of serious financial distress for many months now, and dramatic improvement in the economy is not readily forseeable. The rate of unemployment approaches 10%, resulting in many thousands of consumer bankruptcy filings per month during 1982 -- people in urgent need of relief. The system for providing that relief however, at best can only be guessed at or argued about unless Congress furnishes some direction.

The potential chaos is perhaps even more evident in the business cases. Because of our economy, the size of the companies that have filed or are threatening to file for reorganization under chapter 11 is beyond any recent experience. Some of these major corporations now operating under the protection of the bankruptcy laws and the bankruptcy court's jurisdiction employ more than 20,000 employees each. Thus, among other things, at a time of high unemployment literally tens of thousands of additional jobs are at risk if the various reorganization efforts fail, not to mention the heavy losses of asset values for creditors and stockholders when liquidation results. Chapter 11 cases, however, require a degree of certainty or predictability in the law, and prompt bankruptcy court action is often required if the reorganization is to succeed and the alternative of business closing and liquidation is to be avoided. To take an obvious example, companies typically need to borrow to finance their operations in chapter 11, and provisions in the substantive bankruptcy law accommodate this need with court supervision. But, predictably, lenders will not lend to chapter 11 debtors after October 4, 1982, if there is uncertainty concerning which court, if any, can validly authorize the borrowing; and it is doubtful that an already overburdened district court to the extent its participation is required in the light of _Marathon Pipe Line_, can respond quickly enough to the immediate needs for incurring credit and the myriad other daily crisis demands of operating chapter 11 cases.

In short, without a reconstituted, specialized bankruptcy court in place by October 4, 1982, we would expect a sharply increased failure rate for those businesses that are undergoing or will be in need of chapter 11 relief.

TESTIMONY OF JOSEPH E. FRIEND, ESQ., PRESIDENT, COMMERCIAL LAW LEAGUE OF AMERICA, BEFORE THE SUBCOMMITTEE ON COURTS, COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, JULY 22, 1982

MR. CHAIRMAN, THANK YOU VERY MUCH.

MR. CHAIRMAN, I AM JOSEPH E. FRIEND, FROM NEW ORLEANS, LOUISIANA, WHERE I PRACTICE LAW AS A MEMBER OF THE FIRM DODGE, FRIEND, WILSON AND SPEDALE. I APPEAR HERE TODAY REPRESENTING THE COMMERCIAL LAW LEAGUE OF AMERICA, AN ORGANIZATION OF APPROXIMATELY 6,000 LAWYERS THROUGHOUT THE UNITED STATES, AND OF WHICH I AM THE PRESIDENT.

ACCOMPANYING ME IS CHARLES F. VIHON, SPECIAL COUNSEL TO THE LEAGUE AND FORMER BANKRUPTCY COUNSEL TO THE HOUSE JUDICIARY COMMITTEE.

MR. CHAIRMAN, YOU HAVE HEARD AND WILL CONTINUE TO HEAR MANY INDIVIDUALS AND ORGANIZATIONS URGE THIS COMMITTEE TO REPORT OUT LEGISLATION THAT WILL ELEVATE TO ARTICLE THREE STATUS UNDER THE CONSTITUTION OF THE UNITED STATES THE BANKRUPTCY COURTS CREATED UNDER PUBLIC LAW 95-598. ON BEHALF OF THE COMMERCIAL LAW LEAGUE OF AMERICA, I WILL ADD OUR URGINGS TO THOSE OF THE OTHERS.

MR. CHAIRMAN, THE STATEMENT I AM ABOUT TO MAKE IS A SUMMARY OF A MUCH LONGER DOCUMENT WHICH AT THIS TIME I ASK BE MADE A PART OF THIS HEARING RECORD. . . . .

MR. CHAIRMAN, THE DOCUMENT TO WHICH I HAVE JUST

REFERRED CONTAINS TWO PARTS: AN ANALYSIS OF THE NORTHERN PIPELINE CASE FROM THE VERY LIMITED PERSPECTIVE OF TRYING TO DETERMINE FROM THE OPINIONS WHAT IT IS THAT CONGRESS MUST DO TO LEGISLATE A CURE FOR THE DEFECT THE SUPREME COURT FOUND IN PUBLIC LAW 95-598; AND, A PROPOSED BILL THAT WOULD CREATE THE BANKRUPTCY COURTS PURSUANT TO ARTICLE THREE OF THE CONSTITUTION (WITH A TRANSITION PERIOD THAT WOULD END ON OCTOBER 15, 1983).

MR. CHAIRMAN, AS THIS COMMITTEE ITSELF SAID DURING THE 95TH CONGRESS IN ITS REPORT ON S.2266 AND H.R.8200:

> "A MAJOR IMPETUS UNDERLYING THIS REFORM LEGISLATION HAS BEEN THE NEED TO ENLARGE THE JURISDICTION OF THE BANKRUPTCY COURT IN ORDER TO ELIMINATE THE SERIOUS DELAYS, EXPENSE, AND DUPLICATIONS ASSOCIATED WITH THE CURRENT DICHOTOMY BETWEEN SUMMARY AND PLENARY JURISDICTION, A WASTEFUL REMNANT OF THE REFEREE SYSTEM LEFT OVER FROM THE PRE-CHANDLER ACT ERA."

DURING ITS HEARINGS, THIS COMMITTEE HEARD FROM NEARLY 60 WITNESSES AND RECEIVED SEVERAL HUNDRED WRITTEN STATEMENTS AND COMMENTS. THOSE DEALING WITH THE MATTER OF JURISDICTION OF BANKRUPTCY COURTS WERE VIRTUALLY UNANIMOUS: BANKRUPTCY COURTS' JURISDICTION HAD TO BE EXPANDED. THIS COMMITTEE'S STATEMENT, WHICH I HAVE JUST QUOTED IN PART, IS EXEMPLARY OF THE ATTITUDE THAT PREVAILED. AS SENATOR WALLOP ALSO STATED:

> "THE JURISDICTION OF THE COURTS WILL BE BROAD AND PERVASIVE. NO LONGER WILL NEEDLESS LITIGATION IN SEVERAL COURTS BE REQUIRED TO

> DETERMINE ALL THE MATTERS INVOLVED IN A BANKRUPTCY CASE."

IN SPEAKING TO THIS SUBJECT IN ITS RECOMMENDATIONS, THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, IN ITS REPORT, CALLED ATTENTION TO DELAY, EXTRA EXPENSE AND THE WASTE OF JUDICIAL RESOURCES THAT ACCOMPANIES BIFURCATED JURISDICTION AS BEING THE PRIMARY REASONS FOR INVESTING IN ONE COURT JURISDICTION OF A SCOPE ADEQUATE AND SUFFICIENT TO DEAL WITH ALL MATTERS LIKELY TO BE AT ISSUE IN A BANKRUPTCY CASE.

MR. CHAIRMAN, SIMPLY STATED, THE CHARACTER AND SCOPE OF JURISDICTION GIVEN TO THE BANKRUPTCY COURTS PURSUANT TO PUBLIC LAW 95-598 WAS NOT A MATTER OF DISAGREEMENT. AND, AS FAR AS WE CAN TELL TODAY, IT STILL IS NOT QUESTIONED. IF THAT IS SO, THEN, FROM OUR READING OF NORTHERN PIPELINE, THIS CONGRESS HAS THREE AND ONLY THREE ALTERNATIVES:

1) FOLLOW THROUGH WITH ITS INTENDED INVESTITURE IN THE BANKRUPTCY COURTS OF THE CHARACTER AND SCOPE OF JURISDICTION IT INTENDED THEM TO HAVE BY STRUCTURING THE BANKRUPTCY COURTS SO THAT THEY ARE PERMITTED UNDER THE CONSTITUTION TO EXERCISE SUCH JURISDICTION;

2) RECANT ON ITS ORIGINAL GRANT OF AND ATTITUDE TOWARD JURISDICTION AND BIFURCATE IT SO THAT IT WILL BE EXERCISED BY AT LEAST TWO DIFFERENT COURTS; OR

3) DO NOTHING AND LET EACH CASE BE LITIGATED TO DETERMINE WHETHER THE PROPER COURT HEARD IT IN THE FIRST INSTANCE.

MR. CHAIRMAN, WE BELIEVE THAT YOU WILL SEE THAT THE THIRD ALTERNATIVE IS A VERY UNWISE ONE. DURING THESE WEEKS

SINCE THE NORTHERN PIPELINE DECISION CAME DOWN, WE HAVE SPOKEN WITH LITERALLY HUNDREDS OF KNOWLEDGEABLE LAWYERS, PROFESSORS AND JUDGES. WE HAVE FOUND THAT THERE ARE ALMOST AN EQUAL NUMBER OF OPINIONS AS TO WHAT THE INTENT AND MEANING OF THAT DECISION IS.

MR. CHAIRMAN, CAN YOU IMAGINE THE CHAOS THAT CONGRESS' FAILURE TO ACT WOULD CREATE IN THE BANKRUPTCY, DISTRICT AND APPEALS COURTS OF THIS COUNTRY? THE FEDERAL GOVERNMENT'S ONLY NATIONAL POLICY AND PROCESS REGARDING FINANCIAL DISTRESS WOULD BECOME ATOMIZED INTO TOTAL DISARRAY. THERE WOULD NO LONGER BE A UNIFORM LAW OF BANKRUPTCY THROUGHOUT THIS COUNTRY - IF THERE WOULD BE ANY.

ON THE OTHER HAND, THIS COMMITTEE COULD RESPOND AS THE SUPREME COURT INDICATED WAS THE APPROPRIATE COURSE OF ACTION, THAT "IT WAS FOR CONGRESS TO DETERMINE THE PROPER MANNER OF RESTRUCTURING THE BANKRUPTCY ACT OF 1978". IN THIS RESPECT, THE OTHER TWO ALTERNATIVES WOULD BE CONSIDERED.

MR. CHAIRMAN, THIS CONGRESS INTENDED THE BANKRUPTCY COURTS TO HAVE ADEQUATE AND SUFFICIENT JURISDICTION SO THAT ALL CONTROVERSIES INVOLVED IN THE SAME BANKRUPTCY CASE WOULD BE HEARD AND DEALT WITH BY THE BANKRUPTCY COURT. THE SECOND ALTERNATIVE, HOWEVER, WOULD ENTAIL BIFURCATING THE JURISDICTION PUBLIC LAW 95-598 INTENDED THE BANKRUPTCY COURTS ALONE TO HAVE. THIS ALTERNATIVE WOULD REQUIRE DRAWING LIMITS AROUND THE BANKRUPTCY COURTS' JURISDICTION SO THAT IT WOULD NOT

THEREAFTER TRANSGRESS THE LIMITS SET BY NORTHERN PIPELINE. BUT THIS, MR. CHAIRMAN, IS AN EXERCISE FRAUGHT WITH DANGER. WHAT ARE THOSE LIMITS?

AT LEAST TWO THINGS SEEM TO BE CLEAR FROM A READING OF THAT DECISION: (1) THE CASE ITSELF WAS A CONTROVERSY THE ADJUDICATION OF WHICH BY AN INSTRUMENTALITY OF THE FEDERAL GOVERNMENT REQUIRES AN EXERCISE OF THE JUDICIAL POWER OF THE UNITED STATES WHICH, IN TURN, CAN BE EXERCISED ONLY BY A COURT CREATED PURSUANT TO ARTICLE THREE OF THE CONSTITUTION, PURSUANT TO WHICH THE BANKRUPTCY COURT WAS NOT CREATED; AND (2) THE JURISDICTIONAL PROVISIONS OF PUBLIC LAW 95-598 ARE PART OF A COMPREHENSIVE STATUTORY SCHEME AND GRANT OF AUTHORITY TO THE BANKRUPTCY COURTS THE CONSTITUTIONALLY OFFENDING PORTIONS OF WHICH ARE NOT READILY SEVERABLE THEREFROM, THE PROTECTION OF WHICH SCHEME AND GRANT CONGRESS ALONE MUST EFFECT.

MR. CHAIRMAN, WE SUGGEST THAT IN DETERMINING WHETHER AND HOW TO ACT, THE ONLY REAL QUESTION CONGRESS OUGHT TO GRAPPLE WITH IS WHETHER JURISDICTION OF ALL MATTERS INVOLVED IN A BANKRUPTCY CASE IS TO BE EXERCISED IN THE FIRST INSTANCE BY ONE COURT, THE BANKRUPTCY COURT. IN THIS RESPECT, NORTHERN PIPELINE IS QUITE EASY TO UNDERSTAND: BANKRUPTCY COURTS AS PRESENTLY CONSTITUTED CANNOT EXERCISE A CERTAIN TYPE OF POWER. WITHIN THE COMPASS OF THAT POWER FALLS MANY CLASSES OF CONTROVERSIES THE OUTCOMES OF WHICH ARE INEXTRICABLY INTERWOVEN WITH BANKRUPTCY CASES. HOWEVER ONE DESCRIBES OR DEFINES THOSE CLASSES, THE ISSUE IS WHETHER THEY SHOULD BE

ADJUDICABLE BY THE BANKRUPTCY COURT. IF THE ANSWER TO THAT IS IN THE AFFIRMATIVE, THEN NORTHERN PIPELINE SPEAKS LOUDLY AND CLEARLY: THE BANKRUPTCY COURTS MUST BE STRUCTURED PURSUANT TO ARTICLE THREE OF THE CONSTITUTION. IF THE ANSWER IS IN THE NEGATIVE, THEN ALL THAT NORTHERN PIPELINE GIVES TO CONGRESS AS A GUIDELINE IS THAT CONGRESS MUST DO SOMETHING TO RESTRUCTURE SECTION 241(a) OF PUBLIC LAW 95-598 BECAUSE THE EXTANT PROVISIONS DEALING WITH JURISDICTION - AS WELL AS THOSE DEALING WITH VENUE, REMOVAL, POWERS AND APPEALS - ARE OFFENSIVE TO THE CONSTITUTION.

SHOULD THIS COMMITTEE ANSWER THAT QUESTION IN THE NEGATIVE, THE LEGISLATIVE ALTERNATIVES ARE MYRIAD. CARVING-UP SOME PART OR ALL OF SECTION 241(a) THEN CAN BECOME AN EXERCISE IN LEGISLATIVE INGENUITY. BUT HOWEVER THE CARVING MAY BE DONE, ONE CHARACTERISTIC WILL DOMINATE: JURISDICTION OVER BANKRUPTCY AND BANKRUPTCY-RELATED MATTERS WILL BE EXERCISED BY AT LEAST TWO COURTS.

MR. CHAIRMAN, MORE THAN JUST LEGISLATIVE INGENUITY WOULD HAVE TO ATTEND SUCH AN EXERCISE. NORTHERN PIPELINE DOES NOT INDICATE HOW THE CARVING MUST BE ACCOMPLISHED. MORE WILL BE REQUIRED THAN JUST A SIMPLE REVERSION TO THE SUMMARY-PLENARY DICHOTOMY THAT OBTAINED UNDER THE FORMER BANKRUPTCY ACT. THE STRUCTURE OF THE RELEVANT PROVISIONS IN SECTION 241(a), I.E., 28 U.S.C. SECTION 1471(b), DOES NOT EASILY ACCOMMODATE TO SUCH AN ANALYSIS. IT VERY WELL MAY BE THAT REVERTING TO THE SUMMARY-PLENARY BIFURCATION OF JURISDICTION

WILL COMPORT WITH THE MANDATE OF NORTHERN PIPELINE; MORE LIKELY IT WILL GO BEYOND.

MR. CHAIRMAN, TIME IS OF THE ESSENCE. OCTOBER 4 FAST WILL BE UPON US. IN THESE DAYS OF TRYING ECONOMIC CONDITIONS WHEN FINANCIAL DISTRESS CRIES TO US EVERY DAY IN THE HEADLINES AND FROM THE BUSINESS PAGES, IT WOULD SEEM LOGICAL THAT THIS COMMITTEE WOULD WANT TO MOVE QUICKLY AND EFFICIENTLY TO OVERCOME THE ADVERSE IMPACT NORTHERN PIPELINE HAS HAD AND COULD CONTINUE TO HAVE.

OUR HISTORY OF BANKRUPTCY PRACTICE UNDER THE FORMER BANKRUPTCY ACT HAS TAUGHT US AT LEAST ONE THING: FINANCIAL DISTRESS CAN NOT EFFECTIVELY BE DEALT WITH UNDER THE PROTECTIONS OF FEDERAL BANKRUPTCY LAW WHERE JURISDICTION OVER BANKRUPTCY MATTERS IS BIFURCATED. WITNESS AFTER WITNESS BEFORE THIS COMMITTEE DURING ITS HEARINGS ON S.2266 AND H.R.8200 (DURING THE 95TH CONGRESS) SPOKE OF THE CRITICAL NEED FOR SPEED AND EFFICIENCY IN THE BANKRUPTCY PROCESS. AS HAROLD MARSH, CHAIRMAN OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES TESTIFIED:

> " ... IT IS ABSOLUTELY ESSENTIAL THAT THERE BE EXPEDITION IN THE DETERMINATION OF CONTROVERSIES IN BANKRUPTCY PROCEEDINGS.
>
> THE REASON FOR THAT IS THE TIME VALUE OF MONEY. IF EVERY CONTROVERSY HAD TO BE DOCKETED IN THE FEDERAL DISTRICT COURT AND PUT ON THE CALENDAR AND TAKEN UP AT THE END WHENEVER IT CAME UP ON THE CALENDAR, THEN MOST BANKRUPTCY PROCEEDINGS WOULD NOT BE WORTH CARRYING ON BECAUSE THERE WOULD BE NOTHING LEFT AT THE END OF THAT PROCESS."

MR. CHAIRMAN, ON BEHALF OF THE COMMERCIAL LAW LEAGUE OF AMERICA, I URGE THIS COMMITTEE NOT TO RETURN US TO A BANKRUPTCY SYSTEM BASED UPON BIFURCATED JURISDICTION, HOWEVER THAT JURISDICTION MAY BE DIVIDED. IT CAN ONLY EXACERBATE FINANCIAL DISTRESS.

WE VERY MUCH APPRECIATE THE OPPORTUNITY TO PARTICIPATE IN THESE HEARINGS AND WILL BE MORE THAN PLEASED TO ANSWER ANY QUESTIONS.

THANK YOU.

A BILL TO AMEND PUBLIC LAW 95-598 TO PROVIDE FOR THE CREATION OF COURTS OF BANKRUPTCY PURSUANT TO ARTICLE THREE OF THE CONSTITUTION OF THE UNITED STATES

Section 1. Chapter 6 of title 28 of the United States Code, as amended by section 201(a) of P.L. 95-598, is amended to read as follows:

"CHAPTER 6--BANKRUPTCY COURTS

Sec.
151. Creation and composition of bankruptcy courts.
152. Appointment of bankruptcy judges.
153. Tenure and residence of bankruptcy judges.
154. Salaries of bankruptcy judges.
155. Chief judge; precedence of bankruptcy judges.
156. Division of business among bankruptcy judges.
157. Times for holding regular sessions.
158. Accommodations at places for holding court.
159. Vacant judgeship as affecting proceedings.
160. Adjournment.
161. Apecial sessions; places; notice.
162. Bias or prejudice of judge.

§151. Creation and composition of bankruptcy courts.

(a) There shall be in each judicial district a bankruptcy court which shall be a court of record known as the United States Bankruptcy Court for the district.

(b) Each bankruptcy court shall consist of the bankruptcy judge or judges for the district in regular active service. Justices or judges designated or assigned shall be competent to sit as judges of the bankruptcy court.

(c) Except as otherwise provided by law, or rule or order of court, the judicial power of a bankruptcy court with respect to any action, suit or proceeding may be exercised by a single bankruptcy judge, who may preside alone and hold a regular or special session of court at the same time other sessions are held by other bankruptcy judges.

§152. Appointment of bankruptcy judges.

The President shall appoint, by and with the advice and consent of the Senate, bankruptcy judges for the several judicial districts.

§153. Tenure and residence of bankruptcy judges.

(a) The bankruptcy judges shall hold office during good behavior.

(b) Each bankruptcy judge shall reside in the district or one of the districts for whic he is appointed.

(c) If the public interest and the nature of the business of a bankruptcy court require that a bankruptcy judge should maintain his abode at or near a particular place for holding court in the district or within a particular part of the district the judicial council of the circuit may so declare and may make an appropriate order. If the bankruptcy judges of such a district are unable to agree as to which of them shall maintain his abode at or near the place or within the area specified in such order the judicial council of the circuit may decide which of them shall do so.

§154. Salaries of bankruptcy judges.
Each judge of a bankruptcy court shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. §§351-361), as adjusted by section 461 of this title.

§155. Chief judge; precedence of bankruptcy judges.
(a) In each district having more than one judge, the bankruptcy judge in regular active service who is senior in commission and under seventy years of age shall be the chief judge of the bankruptcy court. If all the bankruptcy judges in regular active service are seventy years of age or older, the youngest shall act as chief judge until a judge has been appointed and qualified who is under seventy years of age, but a judge may not act as chief judge until he has served as a bankruptcy judge for one year.

(b) The chief judge shall have precedence and preside at any session he attends.

Other bankruptcy judges shall have precedence and preside according to the seniority of their commissions. Judges whose commissions bear the same date shall have precedence according to seniority in age.

(c) A judge whose commission extends over more than one district shall be junior to all bankruptcy judges except in the district in which he resided at the time he entered upon the duties of his office.

(d) If the chief judge desires to be relieved of his duties as chief judge while retaining his active status as a bankruptcy judge, he may so certify to the Chief Justice of the United States, and thereafter the bankruptcy judge in active service next in precedence and willing to serve shall be designated by the Chief Justice as the chief judge of the bankruptcy court.

(e) If a chief judge is temporarily unable to perform his duties as such, they shall be performed by the bankruptcy judge in active service, present in the district and able and qualified to act, who is next in precedence.

(f) Service as a referee in bankruptcy or as a bankruptcy judge under the Bankruptcy Act and the Bankruptcy Reform Act of 1978 shall be taken into account in the determination of seniority of commission under this section.

§156. Division of business among bankruptcy judges.
The business of a bankruptcy court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.

The chief judge of the bankruptcy court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.

If the bankruptcy judges in the district are unable to agree upon the adoption of rules and orders for that purpose, the judicial council of the circuit shall make the necessary orders.

§157. Times for holding regular sessions.

The times for commencing regular sessions of the bankruptcy court for transacting judicial business at the places fixed by this chapter shall be determined by the rules or orders of the bankruptcy court. Such rules or orders may provide that at one or more of such places the court shall be in continuous session for such purposes on all business days throughout the year. At other places a session of court shall continue for such purposes until terminated by order of final adjournment or by commencement of the next regular session at the same place.

§158. Accommodations at places for holding court.

Court shall be held only at places where Federal quarters and accommodations are available, or suitable quarters and accommodations are furnished without cost to the United States. The foregoing restrictions shall not, however, preclude the Administrator of General Services, at the request of the Director of the Administrative Office of the United States Courts, from providing such quarters and accommodations as the Administrator determines can appropriately be made available at places where regular terms of court are authorized by law to be held, but only if such court quarters and accommodations have been approved as necessary by the judicial council of the appropriate circuit.

§159. Vacant judgeship as affecting proceedings.

When the office of a bankruptcy judge becomes vacant, all pending process, pleadings and proceedings shall, when necessary, be continued by the Clerk until a judge is appointed or designated to hold such court.

§
§Adjournment.

(a) Any bankruptcy court may, by order made anywhere within its district, adjourn or, with the consent of the judicial council of the circuit, pretermit any regular session of court for insufficient business or other good cause.

(b) If the judge of a bankruptcy court is unable to attend and unable to make an order of adjournment, the clerk may adjourn the court to the next regular session or to any earlier date which he may determine.

§161. Special sessions; places; notice.

Special session of the bankruptcy court may be held at such places in the district as the nature of the business may require, and upon such notice as the court orders.

Any business may be transacted at a special session which might be transacted at a regular session.

§162. Bias or prejudice of judge.

Whenever a party to any proceeding in a bankruptcy court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him, or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the proceeding is to be heard, or good cause shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record that it is made in good faith.

Section 2. Section 292(b) of title 28 of the United States Code, as amended by section 203 of Public Law 95-598, is amended by striking out "or a bankruptcy court" immediately after "to hold a district court".

Section 3. Section 292(d) of title 28 of the United States Code, as amended by section 204 of Public Law 95-598, is amended --

(1) by inserting "either" immediately after "circuit,";
(2) by striking out "bankruptcy court" immediately after "in a"; and
(3) by striking out the comma immediately after "district court".

Section 4. Section 294(d) of title 28 of the United States Code, as amended by section 206(2) of Public Law 95-598, is amended --

(1) by striking out "or district" and by inserting ", district or bankruptcy" in lieu thereof; and
(2) by inserting ", nor of a retired bankruptcy judge to a court of appeals or a district court, nor of a retired district court judge to a bankruptcy court" immediately before the period.

Section 5. Section 331 of title 28 of the United States Code, as amended by section 208 of Public Law 95-598, is amended --

(1) in the first paragraph by striking out "two bankruptcy judges" and inserting "a bankruptcy judge from each judicial circuit" in lieu thereof;

(2) in the second paragraph --
    (A) by striking out "judge" the first place it appears and inserting "and bankruptcy" in lieu thereof,
    (B) by striking out "and district" the first place it appears and inserting ", district and bankruptcy" in lieu thereof,
    (C) by striking out "member" and inserting "members" in lieu thereof,
    (D) by striking out "circuit and district" the second, third and fourth places it appears, and
    (E) by inserting "and a bankruptcy judge" immediately after "shall choose a district" each place it appears;
(3) in the third paragraph, by deleting it in its entirety; and
(4) in the fourth paragraph --
    (A) by inserting "or bankruptcy" immediately after "district" each place it appears,
    (B) by striking out "or a bankruptcy judge chosen by the bankruptcy judges",
    (C) by striking out "or" immediately after "the Chief Justice may summon any other circuit" and inserting a comma in lieu thereof, and
    (D) by striking out "or any other bankruptcy judge".

Section 6(a). Section 372(a) of title 28 of the United States Code is amended in the fifth paragraph by striking out "or district" and inserting ", district or bankruptcy" in lieu thereof.

(b) Section 372(b) of title 28 of the United States Code is amended by striking out "or district" and inserting ", district or bankruptcy" in lieu thereof.

Section 7. Section 376(a)(2)(A) of title 28 of the United States Code, as amended by section 211 of Public Law 95-598, is amended by striking out ", or (iii) in the case of a bankruptcy judge, after retirement under section 337 of this title".

Section 8. Section 451 of title 28 of the United States Code, as amended by section 213 of Public Law 95-598, is amended --
(1) in the first paragraph, by inserting "bankruptcy courts constituted by chapter 6 of this title," immediately after "chapter 5 of this title," and by striking out "and bankruptcy courts, the judges of which are entitled to hold office for a term of 14 years",
(2) by inserting immediately after the second paragraph a new third paragraph to read as follows: "The terms 'bankruptcy court', 'bankruptcy court

of the United States' and 'United States Bankruptcy Court' mean the courts constituted by chapter 6 of this title.", and

(3) in the third paragraph, by inserting "bankruptcy courts," immediately after "district courts," and by striking out "and judge of the bankruptcy courts, the judges of which are entitled to hold office for a term of 14 years".

Section 9. Section 621(a) of title 28 of the United States Code, as amended by section 228 of Public Law 95-598, is amended in paragraph (2) --

(1) by striking out "and" the first place it appears and insertin a comma in lieu thereof, and

(2) by striking out the comma that appears immediately after "United States" the first place it appears and inserting "and two active judges of the bankruptcy courts of the United States" in lieu thereof.

Section 10. Section 621(b) of title 28 of the United States Code, as amended by section 229 of Public Law 95-598, is amended to read as follows:

"(1) Except as provided in paragraph (2) of this subsection, the term of office of each elected member of the Board shall be four years. A member elected to serve for an unexpired term arising by virtue of the death, disability, retirement, or resignation of a member shall be elected only for such unexpired term.

(2) Members first elected to the Board from among bankruptcy judges shall continue in office for terms of two and four years, respectively, the term of each to be designated by the Judicial Conference at the time of their election.".

Section 11. Section 621(c) of title 28 of the United States Code is amended to read as follows:

"(1) Except as provided in paragraph (2) of this subsection, no member elected for a four-year term shall be eligible for reelection to the Board.

(2) The member first elected to the Board from among bankruptcy judges who is designated by the Judicial Conference of the United States to serve a term of office of two years shall be eligible for reelection to one full term of office.".

Section 12. Section 771 of title 28 of the United States Code, as amended by section 233 of Public Law 95-598, is amended --

(1) in subsection (a), by striking out "Based on need each" and by inserting "Each" in lieu thereof; and

(2) in subsection (b), by striking out the last sentence thereof.

Section 13. Section 773(c) of title 28 of the United States Code, as amended by section 233 of Public Law 95-598, is amended by striking out the parentheses immediately after "frivolous" and immediately after "question".

Section 14. Section 1291 of title 28 of the United States Code is amended by inserting "and bankruptcy courts" immediately after "district courts" in the caption of the section, and by inserting "the bankruptcy courts of the United States," immediately after "United States," the first place it appears.

Section 15. Section 1292 of title 28 of the United States Code is amended --

(1) in subsection (a)(1), by inserting "the bankruptcy courts of the United States," immediately after "United States," the first place it appears;
(2) in subsection (a)(3), by inserting "and bankruptcy" immediately after "district"; and
(3) in subsection (b), by inserting "or bankruptcy" immediately after "district" each place it appears.

Section 16. Section 1293 of title 28 of the United States Code, as amended by section 236 of Public Law 95-598, is amended by striking it out in its entirety.

Section 17. Section 1294 of title 28 of the United States Code, as amended by section 237 of Public Law 95-598, is amended --

(1) in paragraph (1), by inserting "or bankruptcy" immediately after "district" the first place it appears;
(2) in paragraph (4), by striking out "; and" and inserting a period in lieu thereof; and
(3) by striking out in their entirety paragraphs (5) and (6).

Section 18. Section 1334 of title 28 of the United States Code, as amended by section 238 of Public Law 95-598, is amended by striking it out in its entirety.

Section 19. Section 1408 of title 28 of the United States Code, as amended by section 240 of Public Law 95-598, is amended by striking it out in its entirety.

Section 20. Section 1471 of title 28 of the United States Code, as amended by section 241 of Public Law 95-598, is amended --

(1) in subsection (a), by striking out "district" and inserting "bankruptcy" in lieu thereof;
(2) in subsection (b), by striking out "district" and inserting "bankrutpcy" in lieu thereof each place it appears;
(3) in subsection (c), by striking it out in its entirety,
(4) in subsection (d) --
    (A) by striking out "(d)" and inserting "(c)" in lieu thereof,
    (B) by striking out "or (c)", and
    (C) by striking out "district or a".

Section 21. Section 1472(1) of title 28 of the United States Code, as amended by section 241 of Public Law 95-598, is amended by striking out "principle" and inserting "principal" in lieu thereof.

Section 22. Section 1473 of title 28 of the United States Code, as amended by section 241 of Public Law 95-598, is amended --

(1) in subsection (a), by striking out "Except" and inserting "Notwithstanding any Act of Congress that confers venue in a specific district and except" in lieu thereof; and
(2) in subsection (c), by striking out "section" the first place it appears and inserting "subsection" in lieu thereof.

Section 23. Section 1478 of title 28 of the United States Code, as amended by section 241 of Public Law 95-598, is amended in subsection (b) by striking out "not so remanding" and inserting to not so remand" in lieu thereof.

Section 24. Section 1482 of title 28 of the United States Code, as amended by section 241 of Public Law 95-598, is amended by striking it out in its entirety.

Section 25. Section 1827(i) of title 28 of the United States Code is amended by striking out "court," and inserting "and bankruptcy court and" in lieu thereof, and by striking out ", and a referee in bankruptcy".

Section 26. Section 1871(a) of title 28 of the United States Code is amended to read as follows:

"(a) Grand jurors in district courts and petit jurors in district and bankruptcy courts appearing pursuant to this chapter shall be paid the fees and allowances provided by this section. The requisite fees and allowances shall be disbursed by the respective clerk of the district or bankruptcy court in accordance with the procedure established by the Director of the Administrative Office of the United States Courts. Attendance fees for extended service under subsection (b) of this section shall be certified by the clerk of the district or bankruptcy court only upon the order of the district or bankruptcy judge, respectively.".

Section 27. Section 1923(b) of title 28 of the United States Code, as amended by section 245 of Public Law 95-598, is amended by striking out "and United States trustees, by inserting "the district" immediately after "the clerk", and by striking out "and by him paid" and inserting ", the docket fees of United States trustees shall be paid to the clerk of the bankruptcy court, and all such fees shall then be paid by the clerks" in lieu thereof.

Section 28. Section 1962 of title 28 of the United States Code is amended by inserting "or a bankruptcy" immediately after "district".

Section 29. Section 1963 of title 28 of the United States Code is amended --

(1) in the first paragraph, by inserting "or bankruptcy" immediately after "district" the first and third places it appears, and by inserting "with the clerk of the district or bankruptcy court, whichever is appropriate" immediately before the first period; and

(2) by adding a new third paragraph to read as follows: "An order of discharge or an order of confirmation of a plan in a case under title 11 which has become final may be registered in any other district by filing with the clerk of the bankruptcy court of that district a certified copy of the order and when so registered shall have the same effect as an order of the bankruptcy court of the district where so registered and may be enforced in like manner.".

Section 30. Section 1964 of title 28 of the United States Code is amended by inserting "or bankruptcy" immediately after "district" each place it appears.

Section 31. Section 2075 of title 28 of the United States Code, as amended by section 247 of Public Law 95-598, is amended by inserting "and in proceedings arising in or related to cases under title 11 immediately after "title 11".

Section 32. Section 2109 of title 28 of the United States Code is amended in the first sentence of the first paragraph by inserting "or a bankruptcy" immediately after "district" the first place it appears.

Section 33. Section 2256(1)(C) of title 28 of the United States Code, as amended by section 250 of Public Law 95-598, is amended by inserting "or under title 11" immediately after "title".

Section 34. Section 402 of Public law 95-598 is amended --
(1) in subsection (b), by striking out "April 1, 1984" and inserting October 15, 1983" in lieu thereof;
(2) in subsection (c) --
(A) by inserting "227," immediately after "225,",
(B) by inserting "231, 232, 234," immediately after "229,", and
(C) by inserting "and sections 6, 9, 10, 11, 14, 15, 17, 25, 26, 27, 28, 29, 30, and 32 of the Act of ______________" immediately after "Act"; and
(3) in subsection (d), by inserting "239," immediately after "230," and by inserting "and section 31 of the Act of ______________" immediately after "Act" the first place it appears.

Section 35. Section 404 of Public Law 95-598 is amended --
(1) in subsections (a) and (b), by striking out "March 31, 1984" each place it appears and inserting "October 14, 1983" in lieu thereof;
(2) in subsection (e) --
(A) by inserting "as amended by section 1 of the Act of ______________" immediately after "201 of this Act" each place it appears, and
(B) by inserting "as amended by section 13 of the Act of ______________" immediately after "233 of this Act" each place it appears; and
(3) in subsection (f), by inserting "as amended by section 1 of the Act of ______________" immediately after "201 of this Act".

Section 36. Section 405 of Public Law 95-598 is amended --
(1) in subsection (b), by inserting "as amended by sections 20, 21, 22, 23, 24 and 33 of the Act of ______________ and sections 14, 15, 25, 26, 28, 29 and 30 of the Act of ______________" immediately after "Act" the first place it appears, and by inserting "as amended by section 1 of the Act of ______________" immediately after "Act" the second place it appears;

(2) in subsection (c), to read as follows: "(c) During the transition period, an appeal from a judgment, order or decree of a United States bankruptcy judge shall be to the United States Court of Appeals for the circuit where such United States bankruptcy judge sits."; and

(3) in subsection (d), by inserting "as amended by section 31 of the Act of ______________" immediately after "title 28".

Section 37. Section 406 of Public Law 95-598 is amended --

(1) by striking out "March 31, 1984" each place it appears and inserting "October 14, 1983) in lieu thereof; and

(2) by inserting "as amended by section 1 of the Act of ______________" immediately after "Act" each place it appears.

Section 38. Section 408(b) of Public Law 95-598 is amended by striking out "1984" and inserting "1983" in lieu thereof.

Section 39. Section 409 of Public Law 95-598 is amended --

(1) by striking out "September 30, 1983" each place it appears and "March 31, 1984" and inserting "October 14, 1983" in lieu thereof;

(2) by striking out "April 1, 1984" and "October 1, 1984" and inserting "October 15, 1983" in lieu thereof; and

(3) by striking out "April 1, 1985" and inserting "October 15, 1984" in lieu thereof.

STATEMENT OF MICHAEL L. COOK,
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NEW YORK, NEW YORK

I appreciate the opportunity to comment on the Supreme Court's Northern Pipeline decision. [1/] Over the past fourteen years I have practiced debtor-creditor law exclusively, representing debtors, creditors (secured and unsecured), creditors' committees, reorganization trustees, bankruptcy trustees, and other parties in bankruptcy and reorganization cases. In addition to having written and spoken on debtor-creditor law, I have been on the Adjunct Faculty of New York University School of Law since 1975, teaching creditors' rights, debtors' protection, and bankruptcy. From 1976 to 1981, I was the Chairman of the Creditors' Rights Litigation Committee of the American Bar Association Section of Litigation.

This statement will address the practical problems that will most likely be generated in bankruptcy litigation if Congress fails to enact remedial legislation in response to the Northern Pipeline decision prior to October 4, 1982. As requested, I will also suggest a limited legislative solution. These comments are based on my extensive experience in bankrutpcy litigation, and do not necessarily reflect the views of any entity with which I have been associated.

The Problem

The Northern Pipeline decision will, if Congress fails to act, dramatically limit the bankruptcy court's jurisdiction--its ability to adjudicate controversies between the debtor's estate and third persons. As Chief Justice Burger noted in his dissent, at the very least, the "'traditional' state common-law action" may no longer be litigated in the bankruptcy court "absent the consent of the litigants."[2/] The representative of the debtor's estate would thus have to prosecute any state law claims outside of the bankruptcy court, although that court would apparently continue to have jurisdiction over suits based on substantive provisions of the Bankruptcy Code. [3/]

The Court in Northern Pipeline did not discuss, however, whether the bankruptcy court could hear other federal claims (e.g., anti-trust and securities law violations) asserted on behalf of the estate when there is no consent by the defendant. That issue had not been raised in the case before it.

Judges and attorneys are understandably unclear as to the scope of the bankruptcy court's jurisdiction if Congress fails to act prior to October 4, 1982. Indeed, one recent newspaper article reported that bankruptcy litigation was now "in disarray" as a result of the Northern Pipeline decision.[4/]

I believe that if Congress fails to act, the bankruptcy court's jurisdiction would be roughly comparable to that which existed prior to the effective date of the Bankruptcy Reform Act on October 1, 1979. At the very least, there will be a costly division of judicial business in bankruptcy cases and a spate of jurisdictional litigation.

The Practical Consequences of Limiting the Bankruptcy Court's Jurisdiction

1. Delay.

The commentators pretty much agreed that the limits on the bankruptcy court's jurisdiction under prior law "had deplorable effects on bankruptcy administration." [5] The most frequently cited reason for expanding the court's jurisdiction was the elimination of costly and unnecessary delay.[6]

The problem of delay in a bankruptcy court of limited jurisdiction was only too real. In one typical case, In re Process-Manz, [7] litigation arose during February of 1963 between the bankruptcy trustee and a secured creditor claiming a lien on all of the debtor's assets. Although the secured creditor objected to the bankruptcy court's jurisdiction, the court went forward with a trial on the merits of the party's claim on April 1, 1963. After 33 days of trial, with over 3,000 pages of testimony and 125 exhibits, the bankruptcy court, on November 27, 1963, denied the secured creditor's jurisdictional motion and ruled against it on the merits. [8]

The district court in this case affirmed the bankruptcy judge's ruling more than one year later, on December 4, 1964. It was not until July 29, 1966, about three and a half years after the litigation began, that the Court of Appeals for the Seventh Circuit reversed the lower court's assertion of jurisdiction over the dispute, reasoning that the bankruptcy court had lacked "jurisdiction to determine a claim without the claimant's consent where it is necessary to weigh the force of opposing credible evidence on a substantial and controverted issue of controlling fact." [9] The Supreme Court denied certiorari on March 13, 1967. [10]

It thus took four years, with substantial judicial effort by three courts, for there to be a ruling on the threshold question of jurisdiction in Process-Manz. Unfortunately, with all of this effort, there was no ruling on the substantive merits of the dispute. The bankruptcy trustee would still have to assert his claim against the secured creditor outside of the bankruptcy court.[11] Even the dissent in the Seventh Circuit's Process-Manz decision noted "the long and wasteful delay of a final disposition of this proceeding already incurred and now extended beyond prediction." [12]

Process-Manz was not atypical.[13] For that reason, Congress wisely made the necessary reform in 1978, and expanded the bankruptcy court's jurisdiction.

2. Expense.

The Process-Manz case also shows the incredible expense that resulted from litigation over the bankruptcy court's jurisdiction. Regardless of whether the debtor was being reorganized or liquidated, the representative of the debtor's estate had to incur substantial legal fees in a fight that merely turned on where the litigation would proceed. As one commentator noted:

> Delay obtainable by litigating the jurisdictional issue has often been the equivalent of winning on the jurisdictional issue, because the litigation itself has afforded time and bargaining leverage to the adversary as against the trustee. [14]

In other words, so long as a defendant could afford to raise the jurisdictional issue, he had tremendous leverage against the trustee.

3. Complexity.

Jurisdictional disputes under prior law were also extremely complex. Despite years of experience in working under the jurisdictional guidelines of prior law, practitioners still had great difficulty in understanding the limits of the bankruptcy court's jurisdiction. Virtually every volume of the

Federal Reporter and Federal Supplement contained a decision on bankruptcy court jurisdiction. The case law also provided ample material for commentators.[15]

In sum, the delay, expense and confusion generated by limiting the jurisdiction of the bankruptcy court were almost universally criticized. There were many good reasons for expanding the court's jurisdiction in 1978, but few, if any, for limiting that jurisdiction. There are still few valid grounds for retreating to the procedural morass of prior law.

The Victims of Time-Consuming Expensive Jurisdictional Litigation

Widows and orphans may not have been the victims of the delay, expense and confusion resulting from the jurisdictional litigation just described. The lawyers certainly were not victims, either. Unfortunately, the persons most adversely affected by any bankruptcy case--the creditors--had to bear the expense.

The representative of the estate who litigated the jurisdictional question had to be paid from the unencumbered assets of the estate on a priority basis. In the Process-Manz case, for example, the trustee's legal fees for a period of four years were paid at the expense of the unsecured creditors. The secured creditor there also had to pay substantial legal fees just to get a ruling as to where the litigation should proceed. That kind of unnecessary legal expense can only drive up the cost of credit for other borrowers.

Practical Benefits from Expanded Bankruptcy Court Jurisdiction

A few days after the Supreme Court handed down its decision in Northern Pipeline, the principal of a commercial finance company underscored to me another practical consequence of the decision. When a debtor seeks reorganization relief, it typically has increased difficulty in collecting its accounts receivable. For that reason, it is important that the representative of the debtor's estate--the trustee or debtor-in-possession--have access to a court that can grant prompt judicial relief and thereby provide the estate with much-needed cash. Since the effective date of the Bankruptcy Reform Act in 1979, secured lenders of Chapter 7 and Chapter 11 debtors have used the bankruptcy court, often as co-plaintiff with the bankruptcy trustee, to enforce the collection of the debtor's accounts receivable.

The secured lender or trustee seeking to collect the debtor's receivables under prior law would have ordinarily sued outside the bankruptcy court, but would have been faced with substantial delay and thus be forced unnecessarily to compromise claims.

The experience under the Bankruptcy Reform Act, however, has been much more positive. Lenders, trustees, and debtor-in-possession have found that the mere availability of the bankruptcy court with a relatively uncrowded docket has significantly expedited the collection process. Even more significant, clients have reported that collection recoveries have been substantially increased.

A Limited Recommendation

Making the bankruptcy court an Article III court, which I support in view of the Northern Pipeline decision, does not necessarily mean that the court will or should preside over every form of complex federal or state law issue that is usually reserved for other courts. The Bankruptcy Reform Act already has a significant provision permitting the bankruptcy court to abstain in appropriate situations.[16/] Bankruptcy judges have in the past abstained from disposing of large, complex cases in which substantial nonbankruptcy issues have been raised and in which third persons are involved. [17/] Indeed, more than forty years ago, the Supreme Court ordered a bankruptcy court with jurisdiction in one case to defer to the state courts on an unresolved issue of state property law. [18/]

Congress can keep the positive benefits from a bankruptcy court with broad jurisdiction, but at the same time provide clearer standards for already existing abstention provisions. For example, the abstention provision of the current law [19] could be supplemented to provide that the bankruptcy court should abstain in the following situations:

(a) When another court has previously taken jurisdiction over a suit later brought in the bankruptcy court; [20]

(b) When there exist unresolved issues of state law; and

(c) When there exist substantial issues of applicable nonbankruptcy law (federal or state.)

This list of suggested grounds is not complete, and probably should not be. There are undoubtedly other situations in which abstention might be appropriate, but an exhaustive enumeration is neither wise nor feasible. The court should have a degree of flexibility within the framework of express Congressional guidelines. In this way, traditional bankruptcy litigation can continue to proceed expeditiously in the bankruptcy court without jurisdictional disputes. At the same time, significant nonbankruptcy suits will proceed in either the federal district or state courts.

Conclusion

Nobody can offer a persuasive practical reason for limiting the bankruptcy court's jurisdiction. On the contrary, the limited experience we have had in almost three years with a court of broad jurisdiction has shown positive results for creditors, the people most hurt by bankruptcy. To ask the victims of a debtor's bankruptcy to bear the additional expense of unnecessary jurisdictional litigation, as had been the case under prior law, is unconscionable, particularly these days, when bankruptcy has become a growth industry.

Footnotes

1/ Northern Pipeline Constr. Co. v. Marathon Pipe Line Co. et al. 50 U.S.L.W. 4892 (1982).

2/ Id., 50 U.S.L.W. at 4903. Justice Rehnquist, concurring in the judgment of the plurality, noted that the plaintiff sought "damages for breach of contract, misrepresentation, and other counts which are the stuff of the traditional actions at common law ...." 50 U.S.L.W. at 4903.

3/ See, e.g., 11 U.S.C. §§ 547 (preferences) and 548 (fraudulent transfers).

4/ N. Y. Times, July 13, 1982, at D2, col. 1.

5/ Kennedy, "The Bankruptcy Court Under the New Bankruptcy Law: Its Structure and Jurisdiction" 55 Am. Bankr. L.J. 63, 85 (1981).

6/ Id.

7/ In re Process-Manz Press, Inc., 369 F. 2d 513 (7th Cir. 1966), cert. denied sub nom. Limperis v. A.J. Armstrong Co., Inc., 386 U.S. 957 (1967).

8/ Id., 369 F.2d at 515.

9/ Id., 369 F.2d at 516, citing, inter alia, Harrison v. Chamberlin, 271 U.S. 191, 193-94 (1926); Cline v. Kaplan, 323 U.S. 97, 98-99 (1944); and In re Kansas City Journal-Post Co., 144 F.2d 812 (8th Cir. 1944).

10/ In re Process-Manz Press, Inc., supra n.7.

11/ Id., 369 F. 2d at 519.

12/ Id.

13/ See, e.g., Katchen v. Landy, 382 U.S. 323 (1966); In re Investors Funding Corp. of New York, 547 F.2d 13 (2d Cir. 1976); Slenderella Systems of Berkely, Inc. v. Pacific Telephone & Telegraph Co., 286 F.2d 488 (2d Cir. 1961); Baker v. Troiano, 468 F.2d 430, 433-34 (2d Cir. 1972); Hollywood Nat'l Bank v. Bumb, 409 F.2d 23, 25 (9th Cir. 1969), and cases cited at n.9 supra.

14/ Kennedy, supra n.5, at 86.

15/ One authority noted that the bankruptcy court's power to hear suits against third parties was "one of the most involved and controversial questions in the entire field of bankruptcy." MacLachlan, Bankruptcy §24 (1956). See also 1 Collier, Bankruptcy, ¶ 2.04, at 147-99 (14th rev. ed. 1974); 2 Collier, Bankruptcy, ¶¶ 23.01-23.21, at 433-645 (14th rev. ed. 1976); Copenhaver, Summary Jurisdiction in Bankruptcy and the Chapter Proceedings, at 71-93 (G. Holmes ed. 1976); Seidman, "Summary or Plenary Jurisdiction," 77 Comm. L.J. 73 (1972); Note, "Scope of the Summary Jurisdiction of the Bankruptcy Court," 40 Colum. L. Rev. 489, 490 n.2 (1940) (jurisdictional issue litigated in every volume of the Federal Reporter and Federal Supplement from 1898 to date of article).

16/ See 28 U.S.C. § 1471(d) (district court or bankruptcy court not prevented, "in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11...").

17/ See, e.g., In re Wonderbowl, 456 F.2d 954 (9th Cir. 1972). In re Eastern Consolidated Utilities, Inc., 17 B.R.809 (Bankr. E.D. Pa. 1982); In re Palazzo, 9 Bankr. Ct. Dec.60 (Bankr. M.D. Fla. 1982); In re Hurt, 9 B.R. 749 (Bankr. N.D. Ga. 1981).

18/ Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1940).

19/ Supra n.16.

20/ In fact, the debtor in Northern Pipeline had previously sued the defendant in the federal district court for the Western District of Kentucky, prior to bankruptcy, for essentially the same relief sought in the bankruptcy court. 12 B.R. 946, 947 (D. Minn. 1981).

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MEMORANDUM

TO: Arthur I. Ungerman, President
Commercial Law League of America

SUBJECT: The Northern Pipeline Case

DATE: July 9, 1982

PREFACE

By its decision in Northern Pipeline, the Supreme Court of the United States has created for bankruptcy practitioners, the federal courts, Congress and individuals who are or will be involved with the bankruptcy process the potential for chaos after October 4, 1982. The Court's mandate in that case has been stayed until that date but even so determining the exact contours of the mandate may require the powers of the Delphic Oracle. That decision has raised many more questions than it has answered.

Northern Pipeline involved an action brought in the bankruptcy court for the District of Minnesota by the Appellant-Debtor (who previously had filed a petition under chapter 11 in that same bankruptcy court) wherein claims were asserted that Appellee had breached its obligations under a contract which had been entered into by and between the parties. Appellee responded with a Motion to Dismiss for lack of jurisdiction. The argument was that the bankruptcy court lacked jurisdiction over the action for breach of contract because it involved an exercise of "the Judicial Power of the United States" which may be exercised only by tenured judges as provided by Article III of the Constitution of the United States and judges of the bankruptcy court are not such tenured judges. The bankruptcy court denied the Motion but the district court granted it reversing the bankruptcy court; a direct appeal to the Supreme Court was taken. That Court now has ruled "that §241(a) of the Bankruptcy Act of 1978 has impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustanied as an exercise of Congress' power to create adjuncts to Art. III courts."

Law professors and other legal scholars will spend many sleepless hours poring over this case to divine from it is intent and meaning - and then again spend countless hours writing their analyses, criticisms, observations and commentaries. None of this ever may deal with the most immediate problem the case has created: what, if anything, should Congress do in response to the Court's staying of its mandate "to afford Congress an opportunity to reconstruct the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws."

Clearly, upgrading the bankruptcy courts to Article III status would satisfy whatever the intent and meaning of *Northern Pipeline* might be: such action is the only absolutely certain way to eliminate any question about the jurisdictional capability and power of a federal court, viz., the bankruptcy courts, to exercise the jurisdiction provided pursuant to P.L. 95-598. However, whether that rout either is necessary and/or desirable can be evaluated only after both the Court's mandate and the range of curative alternatives have been examined.

It is the purpose of this memorandum to analyze *Northern Pipeline* and then to examine alternatives available to Congress as a response thereto.

INTRODUCTION

The plurality writing for the Court stated its conclusion as follows: " ... §241(a) of the Bankruptcy Act of 1978 has impermissibly removed most, if not all, of the 'essential attributes of the judicial power' from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts." Its Order and judgment was that "[t]he judgment of the District Court is affirmed." The district court judgment was "that the delegation of authority in 28 U.S.C. §1471 to the Bankruptcy Judges to try cases is an unconstitutional delegation of authority." And, that district court's Order was that "the adversary proceeding instituted by Northern Pipeline Construction Co. against Marathon Pipeline pursuant to the provisions of the Bankruptcy Code is *Dismissed*." (emphasis in original)

At the outset, the intent and meaning of the plurality opinion in Northern Pipeline lies somewhere on or between two polarities: one, that an adversary proceeding for breach of contract and misrepresentation may not be adjudicated in a bankruptcy court without the consent of the parties; and, on the other, that the jurisdiction and powers of the bankruptcy courts established pursuant to P.L. 95-598 are contrary to and in derogation of Article III of the Constitution of the United States. Where on such a continuum Northern Pipeline actually lies is an extremely difficult question to answer, if it can be answered at all or to the satisfaction of any group larger than one. And, as if that question were not enough to perplex the best of us, it is made all the more complicated by the need for Congress to act before October 4, 1982, if the administration and adjudication of bankruptcy and bankruptcy-related matters is not to become chaotic.

It is not entirely clear that the substantive provisions of title 11 also have not been beclouded as a result of Northern Pipeline. In this respect, though, some comfort may be taken from the Court's own statement:

> "The Bankruptcy Act of 1978 ... made significant changes in both substantive and procedural law of bankruptcy. It is the changes in the latter that are at issue in this case."

That statement should not fall upon deaf ears in the Congress. By its own Report, the House fashioned H.R.8200 so that "the bill contains very little of a procedural nature, unlike the current Bankruptcy Act ... [We intend here an] elimination of most procedure from the statute." However, the following appears elsewhere in the Report:

> "Title 11 of the Code will contain the substantive, and much of the procedural law of bankruptcy."

Nevertheless, for the purposes of this memorandum the analysis of Northern Pipeline and the examination of Congress' alternatives will presume that the Supreme Court did not direct its mandate toward title 11, i.e., the substantive law of bankruptcy, but only toward whatever other provisions in P.L. 95-598 might be (otherwise) relevant. This requires focusing upon the provisions of title 28 (contained in Title II of the Public Law) and those dealing with "transition" (contained in Title IV of the Public Law).

The Court's conclusion followed from its rejection of Appellants' arguments: the plurality took no initiative in identifying the proper argumentation - except for the general comments it made in the early portion of its opinion. It seemed to have presumed the correctness of the decision -

and the reasoning - of the district court. The judgment and order of the district court were entered without explanation. Three months later a supplementary Findings of Fact and Conclusions of Law was issued. In it, the district court repeated its judgment determining unconstitutional the delegation to the bankruptcy court of the jurisdiction provided pursuant to 28 U.S.C. §1471. But, in the supplement, the district court further observed that:

> "The creation of a court with such broad jurisdiction and power without the tenure and salary protections of Article III jeopardizes the independence of the entire judiciary." (emphasis added)

It is not likely that the addition of the reference to the powers of the bankruptcy court was intended to be an expansion of its earlier judgment. Only two of the paragraphs in the supplement dealt with powers. Further, there is nothing in its supplement to suggest that the district court concluded that the expansion of the powers of the bankruptcy court, ipso facto, could have been sufficient either for the court to have determined on that basis alone that the bankruptcy court was unconstitutionally exercising the judicial power of the United States, or that but for the expansion of the powers of the bankruptcy court the delegation to it of expanded jurisdiction would have been constitutionally defensible.

Of primary interest in the district court's supplement is its discussion of judicial power:

> " Thus, the 1978 Act by eliminating the summary-plenary distinction and bestowing all jurisdiction relating to bankruptcy to /sic/ the courts of bankruptcy has transferred Article III judicial power to an Article I tribunal. Indeed, it is the opinion of this court that as jurisdiction to hear 'all Cases, in Law and Equity, arising under this Constitution, the laws of the United States ... is judicial power and as the 1978 Act vests in the courts of bankruptcy a nearly identical jurisdictional reach, there is little doubt that such courts exercise Article III judicial power ... 'judicial power' is more than just a label attached to certain tribunals and not to others. It is shorthand for the class of those powers uniquely resident in the judicial branch of the federal government. Jurisdiction, the power to hear and decide a broad range of cases and controversies, is perhaps the most important aspect of judicial power ...

> the bankruptcy court, by taking jurisdiction over plenary suits traditionally heard by the district courts, inherits through the new code a traditional judicial function."

Apparently, to that court, the constitutional infirmity of P.L. 95-598 was its investing of the bankruptcy court with the jurisdiction to hear those types of cases and controversies that under the former Bankruptcy Act were known as plenary matters. And, further, that that investiture constituted a delegation of the entire range and character of jurisdiction the district court might exercise in civil matters - which jurisdiction could not be exercised by any court other than one created pursuant to Article III. And, finally, that it was the "wholesale transfer of Article III jurisdiction ... /which could not/ be constitutionally sanctioned simply because the recipient has unique responsibility over particular subject matter."

Whether the district court's equating of the full range of its own civil jurisdiction with the compass of the summary-plenary rubric was accurate, much less a matter of established principle of constitutional or procedural law, is questionable. At bottom is the notion that a court whose judges are not granted life tenure nor undiminishable salaries may not adjudicate the full range of disputes that would encompass a district court's civil jurisdiction. And, it is unlikely that the reference to powers by the district court either expanded upon its earlier judgment or contributed anything to our understanding of the jurisdictional limitations imposed by the Constitution upon Article I courts.

As that district court itself observed, much of its analysis of "the nature of the bankruptcy court yields little more than an enumerative definition." In this respect, that court's concern for the importance of the summary-plenary distinction suggests one typology for defining the completeness of the jurisdiction of an Article III court; it refers to the bankruptcy court under the former Bankruptcy Act as an "incomplete" court. Possession of only one part of a bifurcated jurisdiction is more than sufficient to justify such a characterization - even though it is tautological.

Whether or not the district court's supplement was given a presumptive authority or was the direct reference for the plurality opinion in Northern Pipeline, is unclear. At the least it is clear that the plurality opinion was structured so that unless Appellants' arguments were found pursuasive the district court's position had to be affirmed.

On the other hand, that structure also reflects an opinion that could have been based upon grounds the Court itself established, i.e., its recitation, in Part I, of the facts, and its identification, in Part II, of certain "principles". More particularly:

1. The contrast drawn between the role of referees under the Act and that of the judges under P.L. 95-598 - as though, because of the presumed constitutionality of the former, the latter, being a deviation therefrom, had to be suspect.

2. The intimation made that the elimination from P.L. 95-598 of the summary-plenary distinction, maintained under the Act, invested bankruptcy courts with jurisdiction over cases that extended beyond those that affected property of the estate.

3. The intimation made that the powers of the bankruptcy court under the Act were of a nature significantly differentfrom (i.e., less than) the powers of a court of equity, law and admiralty.

4. The proposition stated that the bankruptcy court established under P.L. 95-598 is not independent of the legislative branch and, therefore, incapable of exercising judicial powers.

Further complicating an analysis of *Northern Pipeline* is the 4-2-1-2 split in the votes of the justices and the nature of the four opinions that were written. The concurring justices created the majority by agreeing *only* that:

> " ... so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit over Marathon's objections ... /is/ violative of the United States Constitution ... /and that/ this grant of authority is not readily severable from the remaining grant of authority to Bankruptcy Courts under §241(a)."

Since this memorandum is intended to assist in a determination of what course of action Congress should take in response to *Northern Pipeline*, not all of the issues raised by this case are necessarily relevant. In particular are the questions: what is the judicial power of the United States; with respect to civil matters, is the judicial power of the United States the equivalent of the what are summary matters plus what are plenarymatters; how can a court that does not have jurisdiction over a matter gain such jurisdiction by consent of the parties; why declare unconstitutional matters totally unrelated to the case sub judice; and, of what significance is the source of decisional law in bankruptcy cases when virtually every substantive law question arises with reference to "non-federal" rights.

ANALYSIS

THE CHARACTER OF THE NORTHERN PIPELINE CASE

That Congress intended in P.L. 95-598 that a case such as Northern Pipeline was to be heard and adjudicated by the bankruptcy court, is not controvertible. That the Supreme Court told Congress that this was unconstitutional also, is not controvertible. But, what it was that Congress had to do to effectuate its intent in consonance with the Constitution was not stated by the Court. The Court did state that it was "for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978". But, it went no further to define or describe the specific character, nature, identity or even outline of what Congress' transgression of the Constitution was - except to say that it occurred, and why. If there was any specificity to the plurality opinion (in this respect), it was that "the broad grant of jurisdiction to the bankruptcy courts contained in §241(a) is unconstitutional." This, however, was hardly a specification of anything.

Section 241(a) amends title 28 by adding a new chapter 90 (entitled "District Courts and Bankruptcy Courts"), composed of the following twelve sections:

1471. Jurisdiction
1472. Venue of cases under title 11.
1473. Venue of proceedings arising under or related to cases under title 11.
1474. Venue of cases ancillary to foreign proceedings.
1475. Change of venue.
1476. Creation or alteration of district or division.
1477. Cure or waiver of defects.
1478. Removal to the bankruptcy courts.
1479. Provisional remedies; security.
1480. Powers of bankruptcy courts.
1481. Appeals.

Although not entirely clear, it is not likely that the Court believed or held that all of those sections were facially unconstitutional. As the plurality suggested and the concurring justices stated:

> " ... this grant of authority is not readily severable from the remaining grant of authority to Bankruptcy Courts under §241(a)."

Therefore, in the face of what appeared to the Court to be a comprehensive statutory scheme and grant of authority, the plurality abdicated from specificity.

Even where it did attempt such, i.e.:

> " ... the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against Marathon",

as the dissent stated, the making of a "distinction between claims based on state law and those based on federal law disregards the real character of bankruptcy proceedings." And, more importantly, such distinction is totally without relevance to the provisions of P.L. 95-598. Where, in the scheme of the Public Law, does *Northern Pipeline* fit if Congress "would simply remove the jurisdiction of the bankruptcy court over these matters"?

In speaking of the bankruptcy courts' jurisdiction under P.L. 95-598 and its attempted exercise in the matter *sub judice*, the Court did observe that:

> " Congress has vested jurisdiction over this *and* all matters related to cases under title 11 ... /in/ a single statutory grant of jurisdiction ... " (emphasis added)

Not a particularly well-crafted statement, nor one of precision and specificity; but, nevertheless, probably the most significant because of the similarity of language between it and the jurisdictional provision of §241(a), §1471.

Court	§1471(b)
this	all civil proceedings arising under title 11
and	or
all matters related to cases under title 11	arising in

or

related to cases under
title 11

Since there is no other provision in P.L. 95-598 which identifies, defines or describes the type(s) of controversies the bankruptcy court is authorized to hear and adjudicate, the jurisdictional provisions in §1471 must be the relevant and applicable ones - and the classification scheme established in subsection (b) thereof must, therefore, also be exhaustive. Into which of those three classes did the Court believe Northern Pipeline fit? If the connective "and" is to, as it must, be read as a function word expressing a relationship between the two objects "this" and "all matters related to cases under title 11", there are two possible relationships: (1) "all matters ... " includes "this"; and (2) "all matters ... " does not include "this".

If we begin with the assumption that the Court's "all matters related to cases under title 11" is the same thing as "all civil proceedings related to cases under title 11", then if the first of the above relationships is the operative one Northern Pipeline ("this") is a matter (i.e., a civil proceeding) related to a case under title 11. However, if the second of the two relationships is operative, than Northern Pipeline ("this") could be either (a) a matter arising under title 11, or (b) a matter arising in a case under title 11. It is not possible to determine to a certainty into which class Northern Pipeline was believed by any of the opinion-writing groups to fit (i.e., which of the above relationships was operative). However, we do know that Northern's cause of action did not arise from anything under title 11.

> " ... the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. /Such/ ... claim may be adjudicated in federal court on the basis of its relationship to the petition for reorganization."

Even with respect to the categories "arising in" and "related to", whichever would be appropriate on the basis of the relationship between the claim and the petition for reorganization:

> "The broad range of questions that can be brought into a bankruptcy court because they are 'related to cases under title 11' ... is the clearest proof that even when Congress acts through a 'specialized' court, and pursuant to only one of its many Art. I powers /viz., its bankruptcy powers/"

a bankruptcy court would it have the constitutional authority to hear such matters. This would suggest, first, that the plurality dealt with *Northern Pipeline* as though it fell within the "related to" category. But, second, without particular regard for classification, no matter how closely related to or inextricably interwoven with a matter within the authorized jurisdiction of an Article I court another matter might be, the more an Article I court looks as though it is acting like an Article III court the more the requirement that "exceptional circumstances" exist to justify the extension of jurisdiction. This interpretation appears justified from the following:

> "Art. III bars Congress from establishing legislative courts to exercise jurisdiction over all matters related to those arising under the bankruptcy laws."

It is hard to escape concluding that the plurality classified *Northern Pipeline* as a civil proceeding related to a case under title 11. It certainly was the easy route, and it comports with its adversions to bankruptcy courts' jurisdiction under the former Bankruptcy Act. Although not explicitly stated nor even clearly implied, there is the intimation in the plurality opinion that civil proceedings related to cases under title 11 equates with plenary matters and that since the latter fell without the jurisdiction of bankruptcy courts under the former Bankruptcy Act, since the bankruptcy courts under P.L. 95-598 are the same courts, the former must fall without the jurisdiction of bankruptcy courts under the new Act. This seems to have been just below the surface of the plurality opinion.

In it, the following was observed:

> " ... before the Act /of 1978/ the referee had no jurisdiction, except with consent, over controversies beyond those involving property in the actual or constructive possession of the court ... It cannot be doubted that the new bankruptcy judges, unlike the referees, have jurisdiction far beyond that which can be even arguably characterized as

> incidental to the discharge in bankruptcy or a plan of reorganization."

And:

> " ... that the present case may not fall within the scope of any of any [sic] of our prior cases permitting the establishment of legislative courts."

CIVIL PROCEEDINGS RELATED TO CASES UNDER TITLE 11

The significance of the classification of Northern Pipeline exists only if Congress needs to know what minimum amendment of P.L. 95-598 is required in order to conform it to the mandate of the Court. Knowing the classification of Northern Pipeline would enable Congress to amend P.L. 95-598 while at the same time it maintained the basic structure, powers and remaining jurisdiction of bankruptcy courts. Such knowledge would provide for a neat excision of the offending provision (along with whatever conforming changes with respect thereto also might be required).

Is the totality of the class "civil proceedings related to cases under title 11" offending? Or, is it merely the Northern Pipeline-type case?

There is little insight in the decision regarding which of these alternatives the Court treated as being the basis for its mandate. The plurality spoke of Northern's claim as being "similar" to others "the grant of jurisdiction [to the bankruptcy courts being a grant which] could not constitutionally encompass ... " But, again, as to particular characteristics of the class, the plurality was not specific:

> "It is, of course, true that while the power to adjudicate 'private rights' must be vested in an Art. III court ... this court has accepted factfinding by an ... adjunct to the Art. III court ... "

Referring (under the Crowell and Raddatz decisions) to that which was constitutionally permissible as a delegation of jurisdiction to a non-Article III court, and that which was not, the plurality recognized that:

> "Although Crowell and Raddatz do not expressly distinguish between rights created by Congress and other rights, such a distinction underlies in part Crowell's and Raddatz's recognition of a critical difference between rights created by federal statute and rights recognized by the Constitution ... ⁄ W ⁄hen Congress creates a statutory right, it clearly has the discretion, in defining that right, to ... provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right ... ⁄But n⁄o comparable justification exists, however, when the right being adjudicated is not of congressional creation."

According to the plurality, Northern Pipeline was seeking to vindicate a right that arose from a source other than one from which Congress derived power under Article I of the Constitution.

> "Indeed, the case before us, which centers upon appellant Northern's claim for damages for breach of contract and misrepresentation, involves a right created by state law, a right independent of and antecedent to the reorganization petition that conferred jurisdiction upon the bankruptcy court." (emphasis in original)

That comment, without more, might have been an adequate description of the character of "civil proceedings related to cases under title 11". But a footnote to that comment clouds any such adequacy:

> "Of course, bankruptcy adjudications themselves, as well as the manner in which the rights of debtors and creditors are adjusted, are matters of federal law. Appellant Northern's state-law contract claim is now in federal court because of its relationship to appellant's reorganization petition ... But Congress has not purported to prescribe a rule of decision for the resolution of appellant's contractual claims."

As if it had, by that footnote, exposed its Achilles heel, the plurality opened a door through which the dissent boldly strode:

> " ... the distinction between claims based on state law and those based on federal law disregards the real character of bankruptcy proceedings ... [I]n the ordinary bankruptcy proceeding the great bulk of creditor claims are claims that have accrued under state law prior to bankruptcy ... Every such claim must be filed and its validity is subject to adjudication by the bankruptcy court. The existence and validity of such claims recurringly depends on state law. Hence, the bankruptcy judge is constantly enmeshed in state law issues.
>
> The new aspect of the Bankruptcy Act of 1978 in this regard, therefore, is not the extension of federal jurisdiction to state law claims, but its extension to particular kinds of state law claims ... ["Even this is not entirely new. Under the old Act, in certain circumstances, the referee could actually adjudicate and order the payment of a claim of the bankrupt estate against another."] The old limits were based, of course, on the restrictions implicit within the concept of in rem jurisdiction; the new extension is based on the concept of in personam jurisdiction ... The majority at no place explains why this distinction should have constitutional implications."

Beyond what has been quoted above, the opinions produce little more than broad generalities regarding the nature of "civil proceedings related to cases under title 11" and Northern Pipeline itself. The concurring justices spoke of the matter sub judice as being a "traditional action at common law", as being one determinable by "no federal rule of decision" and merely as being Northern's lawsuit against an objecting defendant. The Chief Justice, in his dissent, was no less definitive: he spoke of "a 'traditional' common-law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law", an "ancillary common-law action".

At best, the Court seems to have said that Northern Pipeline is a civil proceeding related to a case under title 11. But, whether that class is definable exclusively in terms of Northern Pipeline or is a broader class, or what the exact nature of Northern Pipeline is, are matters left quite unsettled. However, even with that unsettlement, the generalities that are discernible are sufficient to provide a frame of reference for an examination of what Congress' alternatives might be.

CURING THE "PROBLEM"

As observed earlier, "[c]learly upgrading the bankruptcy court to Article III status would satisfy whatever the intent and meaning of Northern Pipeline might be: such action is the only absolutely certain way to eliminate any question about the jurisdictional capability and power of a federal court, viz., the bankruptcy courts, to exercise the jurisdiction provided pursuant to P.L. 95-598." Justification and explanation of both the desirability and necessity for this - even if the latter now exists solely because of Northern Pipeline (whatever its intent and meaning) - is effectively and comprehensively discussed in the House Reports 95-595, 7-62; Constitutional Bankruptcy Courts (A Report Prepared by the Staff of the Subcommittee on Civil and Constitutional Rights)(No. 3, June 1977); and, Bankruptcy Courts (Report of the Subcommittee on Civil and Constitutional Rights)(No. 13, January 1978).

The latter two Reports considered the matter in connection with an amendment proposed to H.R.8200 (the "Danielson-Railsback amendment"), an amendment which would have eliminated from H.R.8200 the proposal contained therein which would have made the bankruptcy courts Article III courts and which would have left the bankruptcy courts' jurisdiction essentially what it was under the former Bankruptcy Act. There is little that could - or need - be added to the substance of those Reports that would enhance the argument that upgrading the bankruptcy courts to the status of Article III courts is in the best interests of bankruptcy law, the federal courts and those who might find themselves involved in a proceeding or litigation in or related to bankruptcy.

There may be detractors from the above comments. However, the overwhelming sentiment expressed in the hearings before Congress when it considered S.2266 and H.R.8200 would be in concert therewith. The reality, however, is that the Houses of Congress may not, for one reason or another, be able to agree upon such a course of action. In that case Congress' response to Northern Pipeline would have to take another tack.

LIMITED ELIMINATION OF THAT WHICH IS UNCONSTITUTIONAL

Assuming that Congress would want to leave P.L. 95-598 as much intact as it could, it would eliminate some portion of the provisions for jurisdiction to whatever extent it felt was necessary to comply with the Court's mandate. Such a course of action, however, runs the risk, as the plurality observed, that:

> " ... the jurisdictional provision and adjudicatory structure ... with respect to other types of claims ... /might be/ subject to Art. III constitutional challenge on a claim-by-claim basis."

Obviously, this is not a desirable state of affairs. Bankruptcy courts would find themselves in a "never-never land" of jurisdictional unsettlement for an unknown period of time. But, this is a possibility.

If Northern Pipeline is a civil proceeding related to a case under title 11 but does not constitute the entirety of that class of cases, to eliminate from bankruptcy courts' jurisdiction this type of case it would appear that, from the point of statutory draftsmanship, all that would be necessary would be the addition to 28 U.S.C. §1471(c) of an exception clause descriptive of Northern Pipeline. Such a description probably should reflect the following (and probably need only reflect these matters):

1. The complaint has been filed after the petition was filed.
2. Defendant is not a creditor.
3. Defendant does not consent to the jurisdiction of the bankruptcy court.
4. Adjudication of the cause of action would not result in making the defendant a creditor of the debtor or the estate.
5. The cause of action is not based upon federal statute or rule of decision.
6. The defendant is not in possession - actual or constructive - of property of the debtor or the estate, nor a transferee of such property within 3 months prior to the filing of the petition.
7. There is no insider relationship between the debtor and the defendant.
8. The debtor's petition would have been filed as it was without regard for debtor's cause of action against the defendant.

Once the feasibility of this "limited excision" approach is established, there is no reason that the same format could not also be used to widen the exception by adding more language to the "except" clause in §1471(c). This format would be appropriate up until the point when the "except" clause is of a jurisdictional compass equal to that of "civil proceedings related to cases under title 11". At that point the exception could be accomplished by dealing with the appropriate language in §1471(b); or, if that would raise questions about the jurisdiction of district courts, the focus once again could be §1471(c).

If the entire category "civil proceedings related to cases under title 11" is eliminated from the jurisdiction of bankruptcy courts, it then would be necessary to consider whether such a change would require conforming changes in other sections of the statute - and whether such a change otherwise affects something else in the statute. It would appear that the only conforming changes that would have to be made would be in the venue provisions. But it is possible that changes in the Interim Rules and the Proposed Rules would have to be made.

OTHER ALTERNATIVES

It is possible that for one reason or another - including the simple problem of accommodating to the October 4 deadline - the two Houses of Congress will not be able to agree on any of the above courses of action. In such a circumstance, there may be no alternative other than to turn to recommendations made earlier in the legislative history of P.L. 95-598 which were considered at such earlier time but discarded. In particular, the recommendations of the Commission on the Bankruptcy Laws of the United States and the National Conference of Bankruptcy Judges.

The central features of both recommendations as they dealt with the matter of jurisdiction for bankruptcy courts, were that that jurisdiction was to be greatly expanded over that which it was under the (then) extant Bankruptcy Act, that the distinction between summary and plenary jurisdiction was to be eliminated and that under the new statute bankruptcy courts' jurisdiction would be determined by a listing of types of cases. Both recommendations characterized the scope of the new jurisdiction as extending to "all other actions in which the trustee ... /or the debtor/ is a plaintiff or defendant."

Upon cursory examination, those recommendations do not present themselves in such a way that it is easy to know whether they would satisfy the Court's mandate. First, the general language used in the recommendations, "controversies arising out of a case", may be substantively different from "civil proceedings related to cases under title 11"; moreover, it is not the same as the language in P.L. 95-598 "arising in" and "arising under" which seems to encompass matters the Supreme Court felt could properly be adjudicated by the bankruptcy court. Second, that general "controversies ... " language of the recommendations is followed by "including" and a list of types of cases. The relationship between the general language and the "including" phrase and list is not clear: does the list identify the extent of the general language, or merely some examples falling within its compass? And, finally, what is the extent of the category described in terms of the trustee (or the debtor) being a plaintiff or a defendant. /NOTE: In Northern Pipeline the debtor was the plaintiff./

The Commission's and the Judges' bills are not good models under the circumstances. Time is of the essence and there simply is not enough to reach agreement on the meaning of the language, referred to, which creates significant interpretive difficulties.

Further, the expanded jurisdiction provided for in the Commission's and the Judges' bills is, essentially, the result of eliminating the summary-plenary distinction. The Court did not base its decision upon the impropriety of granting to an Article I court jurisdiction over matters plenary in nature. It is unclear at best that Northern Pipeline has anything to do with that distinction. It is for the very reason that the summary-plenary labels were nothing more than conclusory categorizations of cases found, after litigation, to be properly or not properly within the jurisdiction of the bankruptcy courts under the (former) Bankruptcy Act that it is a poor frame of reference or benchmark for determining what cases fall within the 28 U.S.C. §1471 categories.

THE TRANSITION PERIOD

One of the most important characteristics of P.L. 95-598 is its provision for a transition period between October 1, 1979 and April 1, 1984. During this period the structural and administrative aspects of the new bankruptcy courts would develop and be arranged. The transition period also allows for the emergence of the new court and the appointment of its judges by the President in other than an abrupt way which could be unsettling.

During the transition period, certain studies required by Congress would be undertaken the results of which would serve Congress as guidelines for their determination of the number of bankruptcy judges that would be necessary to staff the new courts, and whether the pilot United States trustee system should continue (and, if so, at what operating scope). Each of those studies, and the validity of their findings, assumed that the powers and jurisdiction of the bankruptcy courts and the work of the United States trustees, both during and after the transition period, would be the same. As stated in the House Report, the transition period would allow the bankruptcy courts to operate "enough like the proposed new court system so that the measurement process of case-load and judicial time requirements will be accurate." These predicates no longer are valid. Whatever it is that Congress decides to do in response to Northern Pipeline, the bankruptcy courts that will exist after that action will not be "enough like ... " those that existed up until October 4 to validate the data produced to that time, through the transition period studies.

If Congress agrees that the bankruptcy judges should be upgraded to the status of judges of Article III courts, substantial technical questions would result from the timing of such. If, for example, this upgrade will be attempted to become effective no later than October 4, 1982, the only practical way to identify, nominate and confirm more than 200 judges before then is to "fold-in" the sitting bankruptcy judges. This is pregnant with serious consitutional difficulty in light of the requirements for the appointment of "officers of the United States" under Article II thereof.

If Congress agrees upon such an upgrade but just can't get its legislative work completed to effect such a result before October 4, what would be the status of matters pending or initiated between October 4 and the effective date of such upgrade? What would be the jurisdiction of bankruptcy courts during that hiatus? And, if an upgrade is agreed upon to occur after a "new" transition period, what is the constitutionally permissible scope of the bankruptcy courts' jurisdiction during this transition period?

Whatever course of action Congress elects to pursue, even if it is to do nothing, one thing it must consider and be prepared to deal with is all that presently (under P.L. 95-598) is supposed to happen on April 1, 1984. The validity of those things that are to occur at that time--is based upon a transition period that has remained stable, i.e., during which time the law has not changed. That, of course, no longer is true.

CONCLUSION

Northern Pipeline is of no particular significance other than as a catalytic agent if Congress agrees to upgrade the status of the bankruptcy courts to Article III courts. Only if such a course of action is not forthcoming is the case otherwise significant. Then it is the frame of reference for what Congress is to do only if that course of action is to be in response to that decision. In other words, if Congress chooses to carve out from the jurisdiction exercised by bankruptcy courts pursuant to P.L. 95-598 that which is constitutionally impermissive pursuant to Northern Pipeline, it will be with reference thereto that such action is taken.

There seems to be little room for questioning the advisability of upgrading the status of the bankruptcy courts. That clearly is what ought to be done. The true issues lie in the realm of achieving that objective in the most efficient and effective way. Those issues ought not to be created or made more complicated than they alreay are by evaluating Congress' alternatives according to considerations other than those which follow directly from the fact or substance of Northern Pipeline.

Senator **Heflin**. We will recess. All of the statements of any of the witnesses will be printed in full in the record, and we will recess the hearing until 10 o'clock tomorrow.

[The hearing recessed at 4:35 p.m.]

[The following material was subsequently received for the record:]

STATEMENT OF
AMERICAN COLLEGE OF TRIAL LAWYERS

The views herein expressed are respectfully submitted on behalf of the American College of Trial Lawyers in regard to the solution of the problem confronting the Congress as a result of the decision of the Supreme Court of the United States in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., decided June 28, 1982.

The College opposes the enactment of H.R. 6978. The College believes that the solution to the problem confronting the Congress lies not in creating separate Article III bankruptcy courts with life-tenured judges, but in amending the Bankruptcy Reform Act of 1978 to eliminate the constitutional infirmities in Section 241(a) while, at the same time, providing the most pervasive jurisdiction possible for bankruptcy judges.

I. The Shortcomings of H.R. 6978. The long-term legislative response contained in H.R. 6978 would lead to an unprecedented expansion of the federal judiciary, creating over 200 new Article III bankruptcy judges. The transitional provisions of the bill would continue the jurisdiction of the present bankruptcy judges until at least March 31, 1983. The College does not agree with either provision.

First, the College opposes the creation of narrowly specialized Article III courts. As was pointed out by the statement of Simon H. Rifkind on behalf of the College in connection with the hearings on the 1978 Bankruptcy Reform Act,* the genius of our federal courts -- and the basis for their vitality and ability to respond to the ever-increasing number of substantive areas thrust upon them (e.g., civil rights, environmental law and consumer protection) -- is that our United States district courts are courts of broad general jurisdiction whose judges are required to deal on a daily basis with the full range of substantive law. H.R. 6978 would create judges who would be selected solely because of their restricted expertise in a single area and would not have the broad background that is currently sought in our district judges. Such narrowness precludes the ever-widening scope and cross-fertilization of legal ideas that federal judges obtain in a unitary court handling many areas of substantive law.

Moreover, Article III status should not be granted to judges serving on specialized tribunals such as the bankruptcy courts because, unlike federal district judges whose jurisdiction covers a broad range of legal areas, the demand for bankruptcy specialists is not constant. The number of bankruptcy filings has fluctuated greatly in the past. In 1981, there were 519,063 filings, but in 1979 there were fewer than half that many (226,476).* Filings naturally increase during economic slumps and slacken off when the economy improves. However, while the number of bankruptcies may follow the business cycle, the number of Article III judges is not so flexible. Unless the nation's economy continues to deteriorate, the number of bankruptcy judges needed to meet the current swell of cases may constitute an embarrassing and expensive judicial glut in a few years. As Justice White noted in his dissent in the Northern Pipeline case, Congress could "face the prospect of large numbers of idle federal judges" (Northern Pipeline, Slip Op., dissent of White, J., p. 27).

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* A copy of that statement, as subsequently published in the American Bankruptcy Law Journal (Volume 52, page 187), is annexed hereto.

Proponents of separate Article III bankruptcy courts argue that temporary assignments of underutilized Article III bankruptcy judges to other, backlogged Article III courts would avoid the problem of cyclical demand for bankruptcy judges. Indeed, the proposed legislation calls for assignability of bankruptcy judges to federal district and circuit courts (H.R. 6978, § 6). But this proposed solution is self-contradictory. Although assignment of

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* See 1981 Annual Report of the Director, Administrative Office of the United States Courts, p. 8.

Article III judges from one court to another is constitutional (Glidden Co. v. Zdanok, 370 U.S. 530 (1962)), temporary assignment of bankruptcy judges to other courts conflicts with the basic rationale of the specialized bankruptcy court. The narrow and specialized expertise that qualifies a bankruptcy judge is very different from the broad knowledge required of a district or circuit court judge. To choose bankruptcy judges explicitly for their particular expertise, on the one hand, and to authorize them to sit on courts of general jurisdiction, on the other, makes no sense and could cause a very serious disruption in the effective administration of justice in the federal courts.

The creation of a large number of bankruptcy judges as Article III judges should also be avoided because of its possible effects on the prestige of the federal judiciary. Although an intangible, the prestige of federal judgeships is vital in attracting highly skilled lawyers who could earn in private practice far more than a judge's salary. Although full equality with district judges might increase the attractiveness of the bankruptcy bench, the resulting benefits, as Judge Rifkind has noted, "would be far outweighed by the dangers brought by a loss of prestige of federal district judgeships" (52 Am. Bankr. L.J. 187, 190 (1978)). This dilution of prestige would be compounded if the bankruptcy judges were also given temporary assignments to district and circuit courts. A message would be sent throughout the profession that a federal district judge, whose responsibilities require knowledge of all points of the law, is fungible with a bankruptcy judge who has been chosen because of his or her narrow expertise.

The permanence of Article III judges alone would caution against the hasty creation of over 200 new, irrevocable judgeships. The Supreme Court's decision has allowed only three months for Congress to consider and enact legislation reconstituting the bankruptcy law. In this short period of time, it would appear unwise to respond to the urgent problem posed by the Northern Pipeline case by creating a substantial number of federal judges which, as Justice White pointed out, would restrict Congress' future options. (See Northern Pipeline, Slip Op., dissent of White, J., p. 27.)

In our opinion, the transitional provisions of H.R. 6978 are themselves of doubtful constitutionality. The bill recognizes the clear impossibility of nominating and confirming over 200 new federal judges before October 4, 1982, and calls for the present bankruptcy judges to continue in office, exercising "the jurisdiction and powers conferred by title 28 and title 11 of the United States Code on bankruptcy courts" (H.R. 6978, §§ 48(a), 49(b)). This "transition period" would last at least until March 31, 1983 (id., §§ 48(a), 50(c)), since it is inconceivable that over 200 new federal bankruptcy judges will be nominated and confirmed by the Senate within this short time. During the transition period, the same untenured bankruptcy judges would exercise the same jurisdiction which has been held unconstitutional, including some powers not shared even with the federal district courts. (See, e.g., H.R. 6978, § 33a, giving the bankruptcy courts exclusive jurisdiction over cases under Title 11.) Any rulings of a bankruptcy judge during this transition period would be subject to constitutional challenge, and the litigants in pending bankruptcies would face many months of unnecessary uncertainty. Such a solution is plainly intolerable.

Moreover, the transition problem is not unique to H.R. 6978. Any transitional scheme that involves exercise of Article III power by a non-Article III tribunal will be subject to the objections noted above. Thus, the only practical short-term solution -- and we believe the long-term solution as well -- is to limit the jurisdiction of the present bankruptcy judges and subject them to judicial supervision. That has been held to be constitutional in the case of magistrates. (See, United States v. Raddatz, 447 U.S. 667 (1980).)

II. The Appropriate Solution. The College suggests that Section 241(a) of the Bankruptcy Reform Act of 1978 be amended to accomplish the following two objectives:

(1) To grant bankruptcy judges the power to adjudicate all matters arising in or related to bankruptcy proceedings with respect to which an Article I court can constitutionally exercise jurisdiction.

(2) To permit the district courts, in all other matters arising in or related to bankruptcy proceedings, to employ the bankruptcy judges as true adjuncts of the district courts.

The foregoing objectives can be accomplished by adoption of either of two schemes. Congress could vest all bankruptcy jurisdiction in the district courts and then empower those courts to refer bankruptcy-related matters to the bankruptcy judges to hear and report proposed findings of fact, conclusions of law and orders of disposition to the district courts, subject to de novo determination by the district courts, as is the case with magistrates. Alternatively, Congress could create a combination of the system which existed prior to the enactment of the Bankruptcy Reform Act of 1978 and the magistrate system. Under this hybrid approach, bankruptcy judges would exercise all of the jurisdiction which they exercised before the enactment of the 1978

Act (commonly called "summary jurisdiction"), subject to ordinary appellate review by the district court on a "clearly erroneous" standard. Bankruptcy-related matters falling outside of the bankruptcy judges' summary jurisdiction would be heard by the district courts or, if such courts chose, would be similarly referred to the bankruptcy judges to hear and report to the district courts, which would make de novo determinations as under the magistrate system.

Under either formula, the reference by a district court to a bankruptcy judge could be either a general reference of the entire bankruptcy case or specific reference of particular issues arising within the case. The legislation might also provide that bankruptcy cases shall automatically be referred to bankruptcy judges unless the district courts specifically opt to retain jurisdiction.

Both of the foregoing proposals have significant strengths. Both permit technical bankruptcy disputes to be resolved by specialists. At the same time, both proposals preserve the involvement of the generalist district judges, thus preventing bankruptcy adjudication from becoming too insulated from other areas of the law. Both proposals also permit the business of the bankruptcy courts to go forward after October 4th. They avoid the interregnum between October 4th and such time as bankruptcy judges, if given Article III status, would be appointed by the President and confirmed by the Senate. The proposals would not be difficult to administer. Lastly, both proposals appear to be constitutional.

Although some proponents of H.R. 6978 argue that the return to a "referee" system similar to that of the federal magistrate system will vitiate all the advances made by the 1978 Bankruptcy Act, their fears are unfounded. The removal of the bankruptcy judge from his former active role in administration of the bankruptcy case, a major advantage of the 1978 Act, does not depend in any way on whether the bankruptcy judge is considered to be an Article III decisionmaker. The bankruptcy judge, exercising the jurisdiction of the district court in a manner similar to that of a magistrate, could still preserve the judicial detachment from details of administering the bankrupt estate.

Neither does elimination of the summary and plenary jurisdiction dichotomy require Article III status for bankruptcy judges. On the one hand, restoration of the summary/plenary jurisdiction distinction is rendered less unpalatable in light of the existence of a substantial body of pre-1978 case law giving substance to that distinction. On the other hand, complete jurisdiction over all facets of bankruptcy could easily, and constitutionally, be vested in the district courts, and the revival of a "referee" system modeled on the federal magistrates -- one of our alternative proposals -- need not lead to a revival of the summary/plenary jurisdiction distinction. The basis of the distinction between summary and plenary jurisdiction before the 1978 Act was statutory, not constitutional, and it need not be revived. A bankruptcy judge, acting as a referee of the district court, could constitutionally consider any matter within the district court's jurisdiction, determine certain matters, and make proposed findings of fact and conclusions of law as to others, "so long as the ultimate decision is made by the district court" (United States v. Raddatz, 447 U.S. 667, 683 (1980)).

The position of the College does not denigrate either the importance of bankruptcy law or the significance of the cases it involves. We are well aware of the number of significant, very complex, and difficult bankruptcies now pending in the courts. Nor does the College dispute the need of an Article III court to have ultimate responsibility for bankruptcy matters. However, that responsibility should lie with federal district judges. If more judges are needed, they should be nominated and confirmed to the district courts, not restricted to the single specialty of bankruptcy law. When difficult or complex problems arise -- whether presented in the context of a large or small bankruptcy proceeding -- the litigant should have access to the district courts, which retain ultimate jurisdiction over bankruptcy cases. In short, the importance of bankruptcy proceedings is no more an argument for conferring on bankruptcy judges Article III powers than the importance of antitrust cases commands Article III powers for magistrates who supervise motion practice and discovery in those cases.

The American College of Trial Lawyers therefore opposes the creation of separate Article III bankruptcy courts, both because it would have an adverse effect on the manner in which bankruptcy cases are adjudicated, and because it would be detrimental to the federal district courts. The College also opposes the transitional scheme in H.R. 6978 because it continues in effect, albeit for a limited period, the very situation which was struck down by the Supreme Court in Northern Pipeline. Instead, we support either of the other proposals outlined above which, in our view, accomplish the desirable goals of the Bankruptcy Reform Act of 1978 without running afoul of the Constitution or damaging the federal court system.

September 2, 1982

Respectfully submitted,

AMERICAN COLLEGE OF TRIAL LAWYERS
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ENCLOSURE.

Bankruptcy Code – Specialized Court Opposed

*By Simon H. Rifkind**

With regard to the proposed creation of a separate Article III bankruptcy court, with life-tenured judges, the American College of Trial Lawyers opposes the creation of separate specialized courts to handle bankruptcy cases, and also the significant increase in the number of Article III Federal judges which the creation of a specialized bankruptcy court would necessitate.

The proposed legislation was reviewed under the auspices of a committee established by the College after the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, held last year, to commemorate the seventieth anniversary of Dean Roscoe Pound's speech on that subject.

Reason for Opposition

There are three major reasons for the College's opposition to these provisions of the bill.

First, the vitality of the Federal courts depends on the fact that district courts are courts of general jurisdiction, whose judges are required to deal, on a daily basis, with the full range of substantive law. Because of this basic structure, changes in one area of the law influence the development of other areas of law. New ideas are allowed to filter through the legal system, so the law does not become stagnant.

Bankruptcy law, as it is now adjudicated in the Federal district courts, is part of this process. It is not a distinct body of learning, isolated from the rest of the law. It is separated only by a permeable membrane through which the full range of procedural and substantive law passes, at every stage of bankruptcy proceedings. When a court must determine the validity of a creditor's claim, it turns to the substantive law underlying that claim.

---

*Immediate Past President, American College of Trial Lawyers and former Federal Judge. Reprinted with permission from the New York Law Journal.

A creditor's claim based on a contract does not depend on a separate body of bankruptcy law, but on the law of contracts. The same is true when a creditor presents a claim based on a tort, a mortgage, or a security agreement. Similarly, when a court must supervise the disposition of a bankrupt's estate, it must decide a broad range of substantive questions – from securities, to antitrust, to tax – depending upon the assets held by the bankrupt. Judges trying bankruptcy cases do not need narrow, specialized expertise but instead need knowledge of, and exposure to, the full range of substantive and procedural law.

Indeed, the profile of bankruptcy court cases prepared for the Committee by the bankruptcy referees supports this assessment. They argue that because of the complexity of bankruptcy cases, the significant sums of money involved, and the range of legal questions presented, bankruptcy referees should be converted into life-tenured Article III judges. I reach the opposite conclusion: For these same reasons, bankruptcy cases should remain in the Federal district court.

As long as bankruptcy cases are tried by Federal district judges exercising a general jurisdiction, the winds of change of legal doctrines will be felt in the bankruptcy law to the same degree as in the general body of the law. The validity of a claim on a contract should not depend on whether it is presented by a plaintiff in a court of general jurisdiction, or by a creditor in a bankruptcy proceeding.

Insulation Seen

If bankruptcy cases are tried in a specialized bankruptcy court, they will be insulated from the rest of the law. Some have argued that such a procedure already exists, because of the increased responsibility given to bankruptcy referees. However, bankruptcy referees act under the jurisdiction and supervision of the district court. Even if only a trickle of the cases in bankruptcy are reviewed by district judges, the benefit of a confluence of doctrines will still be present.

In addition, a specialized bankruptcy court would have other unfortunate consequences. To some extent, a specialized bankruptcy bar has already begun to develop. If a specialized bankruptcy court, with its own procedures, were established, this specialization would be aggravated. General practitioners would become hesitant to appear in bankruptcy courts. The specialization and insulation would then be complete: A specialized bar would practice before a specialized court, applying what is not now and should not be, but would become, a specialized body of law.

These dangers would be felt throughout the Federal judicial system, but would be most acute in those districts whose size would warrant only one or two bankruptcy judges. In that situation, regardless of the talent of those particular judges, the bankruptcy court would tend to become a specialized preserve, deprived not only of the benefits of exposure to the full range of substantive law, but also of the benefits of judicial collegiality.

'Regressive' Change

It is my view, and that of the American College of Trial Lawyers, that such a change is regressive. The entire movement in judicial reform in this century has been in the direction of consolidating courts. At the beginning of this century, it was the general pattern of our state judicial systems to have separate courts for law and equity, and also separate criminal and civil jurisdictions. Many of the states have followed the lead of the Federal courts, in recognizing the benefit of a unified judicial system whose judges become familiar with the full range of the substantive law. The American Bar Association's Standards Relating to Court Organization have also recognized this, and discourage the creation of separate specialized courts.[1]

In addition to these general considerations which militate against the creation of a specialized bankruptcy court, there are two practical problems which lead the College to oppose the creation of such a court.

Effect on Prestige

The first of these practical considerations is that a significant increase in the number of Article III judges, contemplated by the proposed law, would dilute the significance, and prestige, of district judgeships. Prestige is a very important factor in attracting highly qualified men and women to the federal bench, from more lucrative pursuits. As Judge (Henry J.) Friendly (U.S. Court of Appeals for the Second Circuit) has noted:

"The largest district courts will be in the very metropolitan areas where the discrepancy between uniform Federal salaries and the financial rewards of private practice is the greatest, and the difficulty of maintaining an accustomed standard of living on the Federal salary the most acute. There is real danger that in such areas, once the prestige factor was removed, lawyers with successful practices, particularly young men, would not be willing to make the sacrifice."[2]

---

[1] A.B.A. Standards Relating to Court Organization § 1.11(b), at 7-10 (1974).

Proponents of the specialized bankruptcy court have argued that the conversion of bankruptcy referees into Article III judges will make that post more prestigious and thus make it possible to attract more qualified men and women. That is undoubtedly true, but I do not believe that there has been any problem in attracting qualified candidates to accept appointments as bankruptcy referees. The benefits which might flow from increasing the prestige of that post would be far outweighed by the dangers brought by a loss of prestige of federal district judgeships.

'Wholesale' Appointments

The second practical consideration is that it is likely that the creation of a specialized bankruptcy court would lead to wholesale appointment of current bankruptcy referees to the newly created Article III judgeships, short-circuiting the existing machinery for selection of federal judges. I understand that the proposed legislation contemplates that the new Article III bankruptcy judges would be appointed through the traditional selection process, including review by the American Bar Association. The bill also provides that those bankruptcy referees not selected to be bankruptcy judges would be retired at the end of a five-year transition period.

However well-crafted and well-intentioned this mechanism, I seriously doubt that it will work. The pressure to elevate all of the current bankruptcy referees to Article III bankruptcy judges, with life tenure, would be enormous. It is unlikely that the current bankruptcy referees would support the proposed legislation, as they overwhelmingly have, if they truly thought that it would lead to their mandatory retirement in five years. And even if this pressure could be resisted, there would remain the task of finding, during the next years, 300 qualified men and women to sit as Article III bankruptcy judges, and thus be eligible to sit by designation in all Federal circuit and district courts.

Men and women capable of performing the judicial function are of limited supply. That rare combination of character, education, experience, and temperament which comprise a qualified judge does not occur in abundance. The task of finding 300 such persons would strain the selection machinery, particularly because it would come at a time when there is a great need to appoint additional federal judges in both the circuit and district courts.

The American College of Trial Lawyers therefore opposes the creation of a separate Article III bankruptcy court, both because it would have an adverse effect on the manner in which bankruptcy cases are adjudicated, and because it would be detrimental to the Federal district courts.

---

[2] Friendly, *Federal Jurisdiction: A General View* 29-30 (1973).

American Judicature Society ajs to promote the effective administration of justice

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Executive Vice President
George H. Williams
Chicago, Illinois

July 6, 1981

Dear Mr. Rodino:

We should and must have the very best judges to preside over our federal and state judicial establishments. This means not only the men and women as judges of learning, but also those who are outstanding in character and integrity.

What is not so well understood is the relationship between getting the better qualified judges and the making of adequate and proper provision for the retirement of judges when their term of office comes to an end. Upgrading judicial benefits and compensation has long been an important element in the American Judicature Society's formula for improving the quality of the judiciary. The monitoring of judicial retirement plans is one of the oldest continuing projects sponsored by the Society.

Thus, H.R. 3974 introduced by you to provide improved retirement benefits for bankruptcy judges is consistent with our traditional position. Efforts to improve those benefits can help assure us that only the better qualified persons seek and accept this important position. We commend you for your leadership of this important effort.

Sincerely yours,

George H. Williams

GHW/bjb

Honorable Peter W. Rodino, Jr.
2462 RHOB
Washington, D.C. 20515

ISBA
ILLINOIS STATE BAR ASSOCIATION

SECTION ON COMMERCIAL, BANKING & BANKRUPTCY LAW

RECEIVED
OCT 20 1981
RICHARD MERRICK
BANKRUPTCY JUDGE

October 19, 1981

The Hon. Richard L. Merrick
Judge, United States Bankruptcy Court
Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604

Dear Judge Merrick:

The Section Council has reviewed the matters in your letter of August 10, 1981 and has recommended to the Board of Governors of the Illinois State Bar Association that it officially support H.R. 3974. We believe that to obtain and retain qualified bankruptcy judges there must, among other things, be an adequate retirement system for those who serve on the bench.

We hope our action will be helpful and appreciate your bringing this matter to our attention.

Very truly yours,

Kenneth L. Coughlan
Chairman

AMERICAN BAR ASSOCIATION

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1155 EAST 60TH ST., CHICAGO, ILLINOIS 60637 TELEPHONE (312) 947-4000

WRITER'S DIRECT TELEPHONE NUMBER (312) 947-3932

February 16, 1982

Honorable Joe Lee
U.S. Bankruptcy Court
P.O. Box 1079
Lexington, Kentucky 40588

Dear Judge Lee:

As I stated to you on the telephone on February 11, the House of Delegates of the American Bar Association approved the following recommendation at its meeting on January 26th, 1982:

> Be It Resolved, That the American Bar Association supports enactment by Congress of H.R. 3974 (97th Congress), or similar legislation to establish a judicial retirement system for bankruptcy judges and to bring incumbent judges into the system on an equitable basis.

I am enclosing a copy of the report submitted by the Judicial Administration Division in support of its recommendation. As I mentioned on the phone, the House of Delegates does not act on reports submitted in support of recommendations; only the recommendation itself is officially approved by the House.

If I may be of further help to you, please let me know.

Sincerely,

Judith W. Smith

Judith W. Smith

JWS/kab
Enclosure
4321L/4

TENNESSEE BAR ASSOCIATION
3622 WEST END AVENUE • NASHVILLE, TENNESSEE 37205

RICHARD H. ALLEN, SR.
PRESIDENT

PLEASE REPLY TO
1900 ONE COMMERCE SQUARE
MEMPHIS, TN 38103

TELEPHONE 901-523-8211

March 23, 1982

Honorable William B. Leffler
United States Bankruptcy Judge
167 North Main Street
Memphis, Tennessee 38103

Honorable Ralph H. Kelley
United States Bankruptcy Judge
P. O. Box 1189
343 Federal Building
Chattanooga, Tennessee 37401

Honorable Clive W. Bare
United States Bankruptcy Judge
P. O. Box 1470
220 Federal Building
Knoxville, Tennessee 37901

Gentlemen:

I am happy to advise you that the Tennessee Bar Association has adopted the enclosed Resolution supporting enactment by Congress of H.R. 3974 (97th Congress) to establish a judicial retirement system for Bankruptcy Judges.

I have instructed our Executive Director to forward this Resolution to our representatives and senators.

If there is anything else that I can do to be of aid to you in this endeavor please do not hesitate to contact me.

With very best regards, I remain

Very truly yours,

Richard H. Allen

Richard H. Allen

RHA/mbw
Enclosure

RESOLUTION

BE IT RESOLVED THAT, the Tennessee Bar Association supports enactment by Congress of H.R. 3974 (97th Congress), or similar legislation to establish judicial retirement system for bankruptcy judges and to bring incumbent judges into the system on an equitable basis.

THE CHICAGO BAR ASSOCIATION
29 South LaSalle Street
Chicago, Illinois 60603
Phone: 782-7348

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March 24, 1982

RECEIVED
MAR 30 1982
RICHARD MERRICK
BANKRUPTCY JUDGE

The Honorable Alan J. Dixon
Room 456
Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Dixon:

As has been evidenced by recent correspondence to you concerning judicial salaries and survivor benefits of judges, the Chicago Bar Association is vitally interested in seeing that adequate compensation and retirement benefits are available to members of the federal judiciary.

Consistent with our other support of legislation in this regard, we also urge you to support S. 1788 which will provide improved retirement benefits for Bankruptcy Judges.

We believe passage of this bill is essential since once the new Bankruptcy Act becomes fully operational on April 1, 1984, there are no provisions after that time for retirement benefits for the Bankruptcy Judges.

Thank you for your consideration.

Sincerely,

KEVIN M. FORDE
President

KMF/ss

bcc: Richard N. Golding, Esq.
Hon. Richard L. Merrick ✓
Hon. Charles B. McCormick

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The Virginia Bar Association
ORGANIZED 1888

PRESIDENT
JOHN F. KAY, JR.
ST OFFICE BOX 1122
HMOND, VIRGINIA 23208

April 20, 1982

The Honorable John W. Warner
United States Senator for the
State of Virginia
Senate Office Building
Washington, D.C. 20510

Dear Senator Warner:

The Executive Committee of the Virginia Bar Association adopted the following Resolution on April 16, 1982:

> BE IT RESOLVED, that the Virginia Bar Association supports enactment by Congress of H.R. 3974 (97th Congress), or similar legislation to establish a judicial retirement system for bankruptcy judges and to bring incumbent judges into the system on an equitable basis.

The Association hopes that you will see fit to support such legislation.

Sincerely,

John F. Kay, Jr.

17/508

RHODE ISLAND BAR ASSOCIATION

1804 INDUSTRIAL BANK BUILDING PROVIDENCE, RHODE ISLAND 02903 401-421-5740

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EDWARD P. SMITH, EXECUTIVE DIRECTOR

Hon. John H. Chafee
United States Senator
5229 Dirksen Senate Office Bldg.
Washington, DC 20515

April 29, 1982

Dear Senator Chafee,

On March 11, 1982, the Executive Committee of the Rhode Island Bar Association voted the following:

VOTED: The Executive Committee of the Rhode Island Bar Association supports the resolution of the American Bar Association which reads:

> Be It Resolved: That the American Bar Association supports enactment by Congress of HR 3974 (97th Congress), or similar legislation to establish a judicial retirement system for bankruptcy judges and to bring incumbent judges into the system on an equitable basis.

This vote represents the official policy of the Association.

We would appreciate support and assistance in our efforts. Thank you for your attention to this matter.

Very truly yours,

Edward P. Smith

Edward P. Smith
Executive Director

KENTUCKY BAR ASSOCIATION
W. MAIN AT KENTUCKY RIVER
FRANKFORT, KENTUCKY 40601

Office
of the
Director

Area Code 502
564-3795

May 17, 1982

Hon. Joe Lee
Bankruptcy Judge
Fayette County
434 Federal Building
Lexington, KY 40588

Dear Judge Lee:

At its regular meeting on May 12, 1982, the Board of Governors of the Kentucky Bar Association adopted the following Resolution:

> Resolved that the Kentucky Bar Association supports enactment by Congress of H.R. 3974 (97th Congress), or similar legislation such as H.R. 5107 or S. 1788 to establish a judicial retirement system for bankruptcy judges and to bring incumbent judges into the system on an equitable basis.

Sincerely,

Leslie G. Whitmer
Director

LGW:b

Same letter sent to remainder of Congressmen

Louisiana State Bar Association
225 BARONNE STREET, SUITE 210
NEW ORLEANS, LOUISIANA 70112

THOMAS O. COLLINS, JR., EXECUTIVE COUNSEL
TELEPHONE (504) 566-1600

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SCHOOL OF LAW
[illegible]
New Orleans
SOUTHERN UNIVERSITY
SCHOOL OF LAW
[illegible]
Baton Rouge
EXECUTIVE COUNSEL
Thomas O. Collins, Jr.
New Orleans

May 21, 1982

Honorable Bennett Johnston, Jr.
United States Senator
Senate Office Building
Washington, D.C. 20510

Dear Senator Johnston:

The Louisiana State Bar Association's Board of Governors, at its meeting on March 20, 1982, gave consideration to pending legislation covering retirement coverage for bankruptcy judges. By a unanimous vote, the Board resolved:

> "Be it resolved that, the Louisiana State Bar Association supports enactment by Congress of H.R. 3974 (97th Congress) or similar legislation to establish a judicial retirement system for bankruptcy judges and to bring incumbent judges into the system on an equitable basis."

I have been asked by the Board to forward this information to you and to solicit your support for this legislation. The Board appreciates the courtesies and attention given to its positions in the past by you.

With continued best regards, I am

Yours very truly,

Thomas O. Collins, Jr.
Executive Counsel

TOCjr/jc
cc: Mr. Henry B. Alsobrook, Jr., President

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SOUTH CAROLINA BAR
1321 Bull Street
P.O. Box 11039
COLUMBIA, SOUTH CAROLINA 29211
Telephone (803) 799-6653

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Dean Harry M. Lightsey, Jr.
EXECUTIVE DIRECTOR
Robert N. DuRant

June 11, 1982

Honorable Strom Thurmond
Senate Office Building
Washington, D.C. 20510

Dear Strom:

Enclosed herewith is a copy of a resolution adopted by the Board of Governors of the South Carolina Bar endorsing enactment of HR3974 (97th Congress) or similar legislation such as HR5107 or S1788 to establish a judicial retirement system for bankruptcy judges and to bring incumbent judges into the system on an equitable basis.

We shall appreciate your consideration of the position of the South Carolina Bar.

With best wishes,

Sincerely,

Bob

Robert N. DuRant
Executive Director

RND:lsb

enclosure

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John E. Johnston
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E.M. Floyd, Jr.
Kenneth M. Suggs
Dean Henry M. Lightsey, Jr.
EXECUTIVE DIRECTOR
Robert N. DuRant

RESOLUTION

Resolved that the South Carolina Bar supports enactment by Congress of H.R. 3974 (97th Congress), or similar legislation such as H.R. 5107 or S. 1788 to establish a judicial retirement system for bankruptcy judges and to bring incumbent judges into the system on an equitable basis.

Adopted by the Board of Governors
June 3, 1982

Robert N. DuRant
Robert N. DuRant
Executive Director

Attached letter mailed to the following:

Honorable Strom Thurmond
Senate Office Building
Washington, D.C. 20510

Honorable Ernest F. Hollings
Senate Office Building
Washington, D.C. 20510

Honorable Thomas F. Hartnett
509 Cannon Office Building
Washington, D.C. 20515

Honorable Floyd D. Spence
House Office Building
Washington, D.C. 20515

Honorable Butler C. Derrick, Jr.
133 Cannon House Office Building
Washington, D.C. 20515

Honorable Carroll A. Campbell, Jr.
1723 Longworth House Office Building
Washington, D.C. 20515

Honorable Ken Holland
103 Cannon Building
Washington, D.C. 20515

Honorable John L. Napier
1631 Longworth Building
Washington, D.C. 20515

Honorable Peter W. Rodino, Jr.
Chairman, Judiciary Committee
House of Representatives
2642 RHOB
Washington, D.C. 20515

Westchester County Bar Association
White Plains, New York

Martin Drazen
President
Westchester County Bar Association
175 Main Street
White Plains, New York 10601

914/946-3700

June 18, 1982

Hon. Joe Lee
U.S. Bankruptcy Court
P.O. Box 1079
Lexington, Kentucky 40588

Dear Judge Lee:

Please be advised that upon the request of Bankruptcy Judge Howard Schwartzberg and after consideration of this Association's Committee on the Judiciary, this Association's Board of Directors passed the following resolution at its meeting on May 20, 1982:

> BE IT RESOLVED, that the Westchester County Bar Association supports enactment by Congress of H.R. 3974 (97th Congress), or similar legislation to establish a judicial retirement system for bankruptcy judges and to bring incumbent judges into the system on an equitable basis.

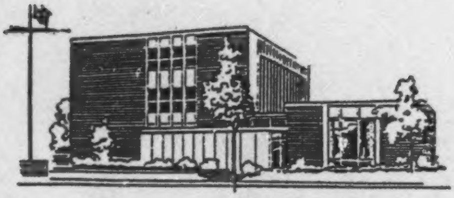
In addition, copies of that resolution are being sent to the Senators and Congressmen representing this area.

Very truly yours,

Martin Drazen
President

D/c

cc: Hon. Howard Schwartzberg
Bankruptcy Court



OHIO LEGAL CENTER

OHIO STATE BAR ASSOCIATION
33 WEST ELEVENTH AVENUE · COLUMBUS, OHIO 43201
Telephone: 614/421-2121

June 21, 1982

JUN 24 1982

Honorable Howard Metzenbaum
Senate Office Building
Washington, D.C. 20510

Dear Senator:

The Council of Delegates of the Ohio State Bar Association, at its meeting on May 13, 1982, adopted the following resolution supporting Congressional activity to establish a judicial retirement system for judges of the United States Bankruptcy Court:

> WHEREAS, the American Bar Association supports enactment by Congress of H.R. 3972 (97th Congress), or similar legislation, to establish a judicial retirement system for bankruptcy judges and to bring encumbent judges into the system on an equitable basis.
>
> NOW, THEREFORE, BE IT RESOLVED, that the Council of Delegates of the Ohio State Bar Association records its support for the enactment of legislation, by Congress, to establish a judicial retirement system for bankruptcy judges.

The Bankruptcy Reform Act of 1978, which became effective October 1, 1979, directed that starting April 1, 1984, judges of the United States Bankruptcy Court shall be appointed by the President, by and with the consent of the Senate, to hold office for a term of fourteen years. There is now no provision for retirement benefits for judges of the United States Bankruptcy Court for service on and after April 1, 1984. Bankruptcy judges are Article I judges, and as such are appointed for a term of years, in this case fourteen years (on or after April 1, 1984), rather than for life as is the case with Article III judges. Because of this special retirement provisions are necessary. Chairman Peter Rodino, when introducing H.R. 3974 in the House of Representatives, stated "The objective of the bill is to provide an equitable plan for bankruptcy judges' retirement, to attract high caliber individuals to the bankruptcy bench, and to retain on the bench the experience of the bankruptcy judges presently sitting."

The Bankruptcy Reform Act of 1978, which eliminated numerous administrative duties of bankruptcy judges, will not require as many bankruptcy judges as there presently are. For all practical purposes, this means that a number of the incumbent judges will not be reappointed after April 1, 1984. Many of the judges have served for long periods after being reappointed to consecutive six year terms by United States District Court judges under the old system.

Presently there is no judicial retirement system for bankruptcy judges. These judges receive retirement benefits under the Civil Service Retirement System which was designed for long-term career governmental employees and not for professionals appointed to governmental service in the middle of their careers.

As always, we appreciate your consideration of our thoughts on this legislative matter.

Very truly yours,

William K. Weisenberg
Director
Government Affairs

WKW:mjj

A SECOND CENTURY OF SERVICE
KANSAS BAR
ASSOCIATION

July 8, 1982

(NOTE: A SEPARATE LETTER WAS SENT TO EACH MEMBER OF THE CONGRESSIONAL DELEGATION)

I am writing to ask for your support of legislation to establish a judicial retirement system for bankruptcy judges, and to bring incumbent judges into the system on an equitable basis.

The Kansas Bar Association joins the American Bar Association and numerous other law-related groups in endorsing such legislation, and has adopted the following resolution:

> Resolved that the Kansas Bar Association supports enactment by Congress of H.R. 3974 (97th Congress), or similar legislation such as H.R. 5107 or S. 1788 to establish a judicial retirement system for bankruptcy judges and to bring incumbent judges into the system on an equitable basis.

Thank you for your consideration of this issue and of our association's position on it.

Sincerely,

John J. Gardner, President
Kansas Bar Association

JJG:jn

bcc: Hon. Benjamin Franklin

Hon. James Pusateri

Hon. Robert Morton

Joe Lee, Secretary
National Conference of Bankruptcy Judges

John J. Gardner, President
Kansas Bar Association

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Wichita 67202 (316) 267-5291

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DISTRICT 2:
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Troy 66087 (913) 985-2322
DISTRICT 3:
Leigh Hudson
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[illegible]urg 66762 (316) 231-0790
[illegible]CT 4:
Doyle Eugene White, Jr.
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THE STATE BAR OF SOUTH DAKOTA

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JUL [illegible]
CLERK U.S. BANKRUPTCY COURT
Sioux Falls, South Dakota

July 8, 1982

The Honorable Clint Roberts
The Honorable Thomas A. Daschle
The Honorable James Abdnor
The Honorable Larry Pressler

Dear Sirs:

Attached please find a resolution adopted by The State Bar of South Dakota at its Annual Meeting in Sioux Falls on June 19, 1982.

Very truly yours,

William K. Sahr

William K. Sahr
Secretary-Treasurer

ds
Enclosure
cc: Tom Foye
Rick Johnson
Peder K. Ecker ✓

RESOLUTION

Be It Resolved, That The State Bar of South Dakota supports enactment by Congress of H.R. 3974 (97th Congress), or similar legislation to establish a judicial retirement system for bankruptcy judges and to bring incumbent judges into the system on an equitable basis.

Be It Resolved, That the Alaska Bar Association supports enactment by Congress of H.R. 3974 (97th Congress), or similar legislation to establish a judicial retirement system for bankruptcy judges and to bring incumbent judges into the system on an equitable basis.

William O Artus

James G Robinson

Barry W. Jackson

Myron Matthews III

James S Crane

THE ATLANTA BAR ASSOCIATION
BOARD OF DIRECTORS

RESOLUTION

The Board of Directors of the Atlanta Bar Association does hereby unanimously adopt the following resolution:

> BE IT RESOLVED that the Atlanta Bar Association supports enactment by Congress of H.R. 3974 (97th Congress) or similar legislation to establish a judicial retirement system for Bankruptcy Judges and to bring incumbent judges into the system on an equitable basis.

This 27 day of May, 1982.

Robert G. Wellon, Secretary-Treasurer

APPROVED:

Jack S. Schroder, Jr.
President

NORTHERN PIPELINE BANKRUPTCY DECISION

FRIDAY, JULY 23, 1982

U.S. Senate,
Committee on the Judiciary,
Washington, D.C.

The committee met at 2 p.m., in room 2228, Dirksen Senate Office Building, Hon. Howell Heflin (acting chairman) presiding.

Staff present: Vincent DeVane Lide, chief counsel, and Sally Rogers, counsel, Committee on the Judiciary, Richard W. Velde, chief counsel, Arthur Briskman, minority chief counsel, and Patrice Brown, chief clerk, Subcommittee on Courts.

OPENING STATEMENT OF SENATOR HOWELL HEFLIN

Senator **Heflin**. We will continue with the hearings on the bankruptcy problems confronting the Nation.

I am sorry we were not able to be here at 10 o'clock, but at 5:01 the Senate was still involved last night. A few of us saw the Sun rise from the east and may be a little groggy from last night's session.

We are delighted to have former Senator Roman Hruska from Nebraska before us.

Senator Hruska left a legacy in the U.S. Government and even more of a legacy in the U.S. Senate where people observed him firsthand and his great work in the Judiciary Committee, his efforts to combat crime, his efforts to improve the judicial machinery of the Nation. I think he is the father of the LEAA Act which, in my judgment, was a great act and did much to professionalize law enforcement in the United States and to bring us into the latter part of the 20th century in combating crime.

Senator Hruska, your interest is far and wide, interest in bankruptcy law, and your firm's interest in this is well known. We are delighted to have you.

If you would come forward, we would appreciate if you would give us the benefit of your wisdom on this very complex problem that we are facing.

STATEMENT OF HON. ROMAN HRUSKA, FORMER U.S. SENATOR, KUTAK, ROCK & HUIE, OMAHA, NEBR.

Mr. **Hruska**. Thank you, Mr. Chairman.

Let me say, first of all, that commendations and congratulations are due you for the valiant service you are rendering this afternoon. After having worked, as you suggest, until sunrise of this morning, you turn up to further your duties this afternoon as chairing this committee.

Mr. Chairman, I am accompanied by Gregory W. Searson, a partner with the firm with which I am associated. He is chairman of the commercial practice department.

I want to thank you for that generous introduction. It is with great respect and due respect that I address any member of this committee, at any time. For a couple of decades, I served as one of its members and I developed a great abiding interest in the judicial machinery and the fashion in which it functions, both adjectively and substantively throughout that time.

I did serve on the Committee on Judicial Machinery which is the predecessor of this committee, which has since been renamed, at a time when we considered the report of the Commission on Revision of the Federal Bankruptcy Act. In fact, the senior Senator from North Dakota was chairman of that subcommittee in those days. He introduced the first bill on the subject which eventually evolved into the act of 1978.

In other assignments and exercises, I likewise participated in the Commission on the Revision of the Federal Criminal Code and as Chairman of the National Commission on the Revision of the Federal Appellate Court System. It is from the vantage point, Mr. Chairman, of these various activities within the walls of this building and in the offices that pertain to it that I come to address the committee on the subject at hand.

We appreciate the opportunity, Mr. Searson and I, to offer our comments and suggestions to the recent Supreme Court decision in the *Marathon Pipeline* case involving the act of 1978 known as the Bankruptcy Reform Act.

A significant part of our law firm's practice is devoted to this branch of the law, and so these hearings have great interest to us in common with those other practitioners and tens of thousands of people in the Nation that depend on it at crucial times during their business careers.

Generally speaking, Mr. Chairman, it has been found and felt, I do believe, that the functioning of the act of 1978, and practicing under it has been favorable, bringing many benefits to all concerned. The changes from previous law were prompted by commercial realities of today's economic system and they are a far cry from what they were even as compared with a period of a decade ago. Many of the older systems, the pre-1978 bankruptcy structure, many of those inadequacies have been overcome by the 1978 act.

A major objective of the new act was to eliminate the expensive and time consuming disputes which occurred because of the division of the jurisdictions between bankruptcy and other courts, Federal and State, and one of the chief and leading express provisions and purposes of the 1978 law was to create the single forum which eventually developed.

This objective was achieved by the creation of the new court, the present court, a wide and virtually all-inclusive spectrum that was endowed upon it in terms of jurisdiction and, in fact, such a generous vesting that in some respects it exceeded the jurisdiction vesting in the Federal district courts themselves.

These grants of power very effectively achieved the desired single forum. But they also brought about the downfall of the Reform Act because the Supreme Court, in the *Marathon* case, held that most of those judicial powers are essentially attributable only to the article III Federal courts and were wrongfully bestowed on the bankruptcy courts under the 1978 act. The court went on to say, after abrogating the offensive grant of power, that it is for Congress to determine the proper manner of restructuring the 1978 act to conform to article III of the Constitution and that is the juncture we find ourselves in at this time.

In general, let me say this, Mr. Chairman, that we urge upon this committee and upon the Congress, that in our search for the proper manner of restructuring, which the Congress is mandated to do by the Supreme Court, every effort should be exerted to preserve and maintain, as far as it is possible to do so, the provisions and the thrust of the 1978 act which have so far yielded much improvement and benefit to the litigants and to the general public.

It was my good fortune and happy experience to have attended the hearings in the other body chaired by chairman Rodino yesterday morning, and then in the afternoon before this body, where the present chairman of the subcommittee presided most of the time.

Two thoughts occurred to me in reflection upon the day's experience in that regard. One had to do with a renewal of an awareness of the complexities of the problem that confronts this committee and the Senate. They were complexities which attended the consideration and the passage of the act of 1978. But they have been added to and they have been increased by reason of the *Marathon* case decision which makes it even more vexatious and more difficult to deal with.

Another thought that occurred to me was the importance of the emphasis that was placed upon the period of transition that would have to be experienced to get from the level of the 1978 act as providing for an article I body or entity and getting it into the sphere of an article III body.

We heard again and again from the witnesses here, as well as at the other end of the Capitol campus, that the only alternative would be an article III court. And yet, as we listened to the testimony, as I listened to it and appraised it, when the question was asked how can we engage the machinery, which will be necessary to cover that period of transition from one grade of court to another, no satisfactory answer was forthcoming. There was a citation of a case or two that might in a somewhat nebulous form say, in case of great emergency, this or that or the other thing could be done. But the fact remains, Mr. Chairman, that no satisfactory answer came as to how this could come about. Such transition would be most difficult.

Here we have a couple of dates before us. One is October 4, 1982. We have another one of April 1, 1984, the latter date being the one specified in the 1978 act for a complete transformation from the temporary, interim structure to what would be known as a more permanent structure.

But the plain fact is, Mr. Chairman, that it would be impossible to appoint article III judges and install them before October 4, 1982, even if we had an act in place that would be satisfactorily approved by both Houses of the Congress. All of us are aware of the machinery and the long, generation long practices and customs of the Congress and the executive department for the nomination and the appointment and the confirmation of article III Federal judges of this land.

Let me suggest that in 1978, I believe it was the Omnibus Judge Act, provided for the creation of 152 Federal article III judges. It took over 2 years to fill the new judgeships that were provided for in that bill.

Senator **Heflin**. If I might interrupt you, we still have a few that have not been filled yet.

Mr. **Hruska**. There are a few and, of course, that picture has been contributed to somewhat by a process of attrition, by way of retirements and deaths; and so it is a slow moving process. And I make no apologies for it. Such procedure is a part of the governmental scene and a necessary part it. I think all of us who are familiar with such functioning of the Government are aware of that.

At any rate, there is no assurance that the President shall have appointees in place—they cannot be in place by October 4, 1982. They cannot be in place, in my judgment, by April 1, 1984, and there is a definite hazard in presuming that the Supreme Court, in its future actions, will say,

> Well, we will go along with you. We know your intentions are good and you are going to do the best you can, and we will put up with an unconstitutional court for a year, a year and a half, two years.

There is no assurance, in fact small likelihood, that any such charitable attitude will be exhibited by the Supreme Court.

It is well to note, and all of us are aware, that it is a plurality opinion and decision which were turned out in the *Marathon* case and that complicates the picture even more than normally.

There is an alternative, Mr. Chairman, other than indulging in the wish and the hope that we can somehow miraculously and by some legerdemain convert the present article I judges into article III judges, in the time period available.

There is another alternative which is by adopting certain modifications of the 1978 act in certain respects, which I propose to detail here, and with these three goals. One is the preservation and the maintenance of the thrust and the operation of the 1978 act as much as possible to do in keeping with the *Marathon* case.

Second, to obviate the difficulties and the complexities, in my judgment, of the insuperable obstacles of a transition period, if we resort to do any other method.

And, third and finally, to render the Bankruptcy Court a true and acceptable adjunct of the Federal court system.

Now, we propose to do this, and it is detailed in our complete statement, which I trust will be incorporated into the record, in these five ways:

First of all, a de novo appeal from Bankruptcy Court to the district court. Details on that are found on pages 9 through 11 in our statement.

Second, a direct appellate review of the decisions of the Bankruptcy Court and the appeal panels of the article I court would be abolished because, as the Supreme Court pointed out, there is no case of controversy that arises from the filing of an appeal from the article I courts that is cognizable in the Federal court system.

Third, the appointment of bankruptcy judges by the circuit court and provisions for removal by the Judicial Council. The delegation of jurisdiction to the Bankruptcy Court by the district court or the filings of the petitions of bankruptcy would be initially locked.

Finally, as a conciliatory and as a good faith measure to those who would assume the positions of the bankruptcy judges, that there would be a statutory provision against the reduction in salary or pension rights during the tenure of their office.

So it is that we believe that by such modification of the existing act there would be an uninterrupted operation of bankruptcy. It would be somewhat hampered because of the loss of that central feature of the present act, namely, a single forum. Under the rules of the land, however, we are required to comply with a decision coming from the Supreme Court.

We believe that we outline in our statement an alternative to the situation other than the article III approach which is presented by many other witnesses in these hearings. I highly respect them because they are practitioners, they are professors, they are people who are very knowledgeable. But we cannot escape the fundamental proposition, there is no way in which Congress can constitute and install article III courts within the time limitation prescribed by the Supreme Court. In my judgment, there are insuperable difficulties to timely creation and installation of article III courts which are advocated by some witnesses as a solution.

That constitutes the remarks I have. Mr. Searson and I are here to answer any questions and make any further observations that are invited by the chairman.

Senator HEFLIN. Senator Hruska, from your knowledge and experience in the field of bankruptcy, do you have an opinion as of this stage as to whether or not it would be wise to, in effect, have bankruptcy matters heard by article III judges?

Mr. HRUSKA. Mr. Chairman, there are many merits that are attached to that position; but I say very respectfully I do not favor resort to the article III court concept. The merits of that concept come from the fact that it is only thereby that the goal of a single forum can be achieved; that is, a centralized forum that would be able to deal with situations as they come up in bankruptcy proceedings, with dispatch and with competence.

But, on the other hand, there are some balancing factors and elements which must be taken into consideration. My recollection is, and do not hold me to the exact arithmetical total, but my recollection is there are approximately 600 district and circuit court of appeal judges. Now, there will result a substantial and massive impact upon our present court system to engrave into it a large number—between 220 to 250—of specialists who will have the equal or even more extensive jurisdiction to that of existing Federal district judges. Many real fears exist as to the potential for harm flowing from such an impact.

Now, that will be a great severe impact. Is it for good or is it for bad? I have my own appraisal of the situation. I think most people would have grave misgivings to have that tremendous percentage of the membership of the district bench being added to in that short space of time. That is one of the factors: What impact it will have on the Federal district bench as an institution? It has developed its traditions. It does develop its approaches to procedures; and there is a feeling of collegiality and of functioning which have evolved through the decades. All of these elements would be greatly disrupted by 220 to 250 new judges admitted all at once.

A second factor is this: Under such a proposal we swear into the district bench for lifetime anywhere from 200 to 250 people, and there they are for life. Later Congresses may abolish the court, or may abolish or greatly reduce its jurisdiction, but we cannot abolish their tenure or reduce their salaries by reason of the kind of constitutional appointment they have. Depriving the Congress of the flexibility for future potential treatment of structuring and functioning of the judicial system would be very serious indeed. There we have it. We have an inventory there of that many judgeships. What will we do with them if there is a change or reversal in circumstances equivalent or even partially equivalent to that which has happened in the last decade?

Suppose there is a reversal or a tangential force in a different direction? What will we do? It is a problem and it is an irreversible situation which will have been created because there would be anchored into the judicial system lifetime judges who cannot be dislodged.

The Congress had its reasons for going the way it did in 1978 by making an effort to stay with article I judges. One of the purposes, no doubt, was to preserve elasticity. One of the purposes was that this approach was less traumatic and less disruptive of the overall judicial system than the creation of article III bankruptcy judges in such a large number.

My memory goes back to the considerations that we had in the judicial structure on the Commission for the Revision of the Federal Appellate Court System. There we early discovered that there was a general antipathy toward specialized courts. And with some justification, when the whole story is told, when the whole record is laid bare. That was another factor, I am sure, which motivated in some degree the decision of the Congress to finally compromise on what presently resides in the 1978 act.

Taking all of these things into consideration, my inclination and my conclusion has been that it would not be well to put this type of operation into the hands of article III courts on the basis proposed in the various bills that are presently pending.

Senator HEFLIN. If the U.S. Supreme Court were to follow its rationale and determine that more and more of the litigation involved in bankruptcy requires an article III court, it could be a movement toward the overall field of bankruptcy being in some type of article III which raises a number of questions. I am not sure that my thinking is crystallized. But let me just give you some thoughts that occur and then let you comment on it.

We, in the field of magistrates—we now have many, many uses of magistrates. For example, if I recall correctly, there was—before the omnibus judge bill, in 1978, there were 399 district court judges and there were 196 magistrates at that time, a basic ratio of one magistrate to every two district court judges. Magistrates, of course, cannot get into the decisionmaking process. They do it by consent. They do it by—in the form of a master reporting to a district court judge, a form of a master reporting to the district court. There are anticipations that the number of full-time magistrates will grow. We created the omnibus judge bill, I believe you said we created 154—well, I believe there are 113 district court judges. We have legislation now that would create 40 more district judges. As matters become more complicated, we will probably have more magistrates. There have been some projections that in 5 to 10 years we could have more magistrates than we had district court judges.

There is some feeling that there is a tremendous amount of litigation now in the Federal district courts that are, we will say, less important than some other litigation. That gets into the question of what is less important. There is some feeling that in effect—we ought to create a two-tier Federal bench. Appeals like those from social security rulings would be handled by magistrates. Matters, say, maybe some type of workmen's compensation appeals may be declared a general area, misdemeanors, other matters that could be given to them. In effect, a two-tier trial court where less important cases are designated to a judge below the U.S. district court judge would mean that you would have to have categories of judges. You could have a category of a—we will say a U.S. district court judge and a U.S. associate judge which would be inferior, even though I do not like the use of the word "inferior." I do not like it. I do not think we ought to have inferior courts. But there would be lesser type cases. It would be basically a two-tier system.

Do you see any constitutional problems in creating—I am not asking the wisdom of this but just the constitutional problem of creating an inferior judge to the U.S. district court judge? I use that word "inferior" advisedly. I do not like it. But, in effect, their salary would be different and they would still be Presidential appointments and, at the same time, include bankruptcy judges in that category. Being then with a fixed jurisdiction and being an article III judge, you would not necessarily have to have de novo appeals but appeals that go through your regular appeal process.

I am pointing all this out and rambling because my thoughts are not crystallized. But our first question is, Do you consider that there would be a constitutional impediment to the creation of a class of judge below the U.S. district court judge but which would be an article III judge?

Mr. HRUSKA. Yes; there is that proliferation which you describe. If it goes on to the degree which becomes monstrous and monumental, of course, we will get into trouble. We will get into trouble because there will be a removal from operations of the traditional, conventional article III judge and court which has general jurisdiction and which has various implements and instrumentalities to aid in their final judgment. Retaining supervision and retaining the capacity to make the ultimate judgment, must be preserved.

Now, when we get away from that area of activity in terms of article III judges, then we will have to run the risk of having a dilution of quality, a dilution of a central national purpose and of uniformity of laws which we like to think that America seeks to attain, if possible.

I can imagine quite a list of agencies, like workmens compensation, in social security, in Veterans' Administration and others—all of whom would say, "Let us get into the same category that the bankruptcy judges enjoy and let us also have article III powers because we are important."

Now, given that proliferation and that tremendous spread, then it seems to me we will be sacrificing not only quality but format and central purpose in our national destiny and national operations which would not be desirable.

As to the question of magistrates, and of bankruptcy judges—they can be fairly well contained because under the guidance of that *Raddatz* case and under further guidelines pronounced in the *Marathon* case, there are certain areas of territory, which the Supreme Court will not allow to be transgressed. Unless there is a line of accountability, unless there is control, unless there is that connection with the court system which makes these courts truly adjuncts, they will not comport with our constitutional provisions.

But the situation that you described, and it is never overstated--it may sound overstated. But to those who have considered it to its final stages, the danger is there. I do believe, there should be a constant alert on that point and proper cautions taken.

Senator **Heflin**. Well, now, of course unless it were to be extended, we are faced with this deadline of October 4. I sense that there is a feeling that the whole issue of bankruptcy judges in *Marathon*-type cases ought to be carefully considered and there is a feeling that we ought to go into some sort of temporary plan with a sunset date on it which would force Congress to look at it during the interim period, and make final decisions, and perhaps during that period of time study the proceedings in the bankruptcy court and see how they work. Thoughts on this as a temporary measure may have different viewpoints, but right now the one that I am hearing discussed with people more is some form of a de novo appeal to the district court judge. We have several alternatives of a de novo appeal procedure. One would be to establish a category by which you would have de novo appeals. Then you would attempt to establish a category in which there would not be de novo appeals, basically following the present Bankruptcy Act. The idea being that it would be least disruptive to the present situation and would have the single forum and the merit of the reforms accomplished by the 1978 act.

Of course, a category of the demarcation where you would have de novo appeals and between those where you do not have de novo appeals, may be a drafting problem as to how you would word it. You could be influenced by the fact that, well, we do not think the U.S. Supreme Court will broaden this and, in the meantime, we will try to lean in effect to giving the bankruptcy court much of its current power without de novo appeal. That is one alternative.

Another alternative would be if there is any real serious question of its constitutionality, then they ought to have a de novo appeal.

If we decided it did require a good deal of study and that we ought to have some sort of interim with a sunset procedure, what is your thinking as to what that structure ought to be? What are your thoughts on whether or not there should be article III judges?

Mr. **Hruska**. Well, I do believe, Mr. Chairman, the proposals we made here for a series of modifications of the 1978 act provide two things: one, essentially, is that it would be a good interim measure with a sunset feature attached, if it is the pleasure of the Congress to do so, to gain enough time to consider a permanent basis that is practical for the installation and commencement of operations of article III bankruptcy judges. Consideration in final form of such a measure is essentially premature. Not only because of the time element in the appointment and confirmation, but also because no decision and very little discussion in congressional circles, that I have been able to encounter, deals with the proposition. Maybe we do not need 220 such judges. Maybe we can do with 120, and have them distributed at strategic geographic points.

Senator **Heflin**. You could give them magistrates.

Mr. **Hruska**. Maybe so. But the vehicle is here now, consisting of amendment and modification of the 1978 act. It is a vehicle which comports with the decision of the Supreme Court. Put a sunset on it if it is the pleasure of the Congress to do so. In the meantime give Congress time to hammer out some situation that will consist of the article III court, that will give it that single forum and give what Mr. Creel described so well in his testimony so that when there are immediate—situations of dispatch and emergency, it can be dealt with expeditiously. It would be much premature at this point to think in terms of perfecting such a complex law within present time limitations.

I recognize the inadequacies, I think all of us recognize the inadequacies of the pre-1978 machinery. I think most of us recognize quite clearly the inadequacies of what would happen with the 1978 act even if it were amended as recommended—if it were enacted with the modifications which I have described here. They are short term.

But the trouble comes, what will you put in its place that will get the blessing and avoid the condemnation of the Supreme Court and something that will be of permanent value? Each proposal, as this one does, carries with it some disadvantages as well as advantages. But I believe our proposal for modification of the 1978 act is good as can be devised in terms of an interim approach. It is as good a situation that we can hold the line with because it continues a going concern. The structure provided in the 1978 act as we would modify it is a going operation. It lacks the central forum, the single forum. But there is some comfort in having readily at hand through the de novo proceeding which is provided in these modifications as to the decisions of the bankruptcy judges, going to the district court de novo. It is then for the district judge to bless the appealed matter or modify, or reject it.

Senator **Heflin**. Mr. Velde?

Mr. **Velde**. Thank you, Mr. Chairman.

Just two brief questions.

Senator, in your testimony, you recommend that the bankruptcy appellate panels be abolished as a way of streamlining the machinery and making it more amenable and supervision of the article III judges.

Is this recommendation based on experience that your firm has had in bankruptcy practice with these groups, or is it based on necessity to streamline the procedures to comply with the court's opinion?

Mr. **Hruska**. Well, it is not based on experience. It is based really on the holding of the Supreme Court, that the 1978 act bankruptcy judges are not true adjuncts of the article III jurisdiction. They are not an authorized entry into the judicial system. There is no case or controversy that arises by reason of any decision 1978 act bankruptcy judges make. If that is true, as to the initial proceeding before a bankruptcy judge, it certainly would be true as to a panel of judges of that same level and caliber sitting in an appeal on the initial judgment.

If one is a nullity, the panel of three is three times a nullity and you still have nothing.

So it is a matter which has no standing. The article I bankruptcy judges have no standing in the judicial system. That was the impact of the Supreme Court's decision, as I understand it.

Mr. **Velde**. The committee received testimony yesterday to the effect that these appellate panels had worked well in practice. You have no information to the contrary, as far as that is concerned?

Mr. **Hruska**. I would be happy that such appellate procedure provided that they would be article III bankruptcy judges, and that they are article III bankruptcy judges sitting in panels on appeal.

I would not be adverse to having appeals from that single judge's decision referred to a panel of article III bankruptcy judges. That would be all right, but they would have to be judicially recognized. They would have to be part of the court system and thus would be competent and capable of handling appeals. In panels of three, I think they would very likely succeed, as well, and be as fruitful in their product as the panels have proved to be in the Ninth Court of Appeals under present practice.

Mr. **Velde**. When the Bankruptcy Act was established, and machinery was put into place, there were about 220 bankruptcy judge positions created. Since that time about 45 additional part time have been added.

Also, since the 1978 act, the volume of bankruptcy business has essentially tripled. The testimony suggested yesterday that, if anything, the number 220 would be on the low side of the judicial structure and organization membership necessary to handle this rapidly increasing workload.

Has your experience been that the machinery is overloaded now? Do bankruptcy judges, article I or article III, no matter what their status, have more business than they can handle? Should we, in the process of attempting to deal with this constitutional crisis, if you will, look at what increases or what changes might be made to accommodate this increased workload?

Mr. **Hruska**. Well, I would not be qualified to testify on that, nor have I a measured opinion. We learned, in constituting the omnibus judgeship bill, however, in the field of district judges, particularly circuit judges, that the gross number of pending cases, the gross load in terms of pending cases, had component elements which had to be weighted in a proper way.

An antitrust case is one thing. A patent case is another. A criminal case is another. And thus, we have cases of various weights, in terms of court time required.

Now, I do not know what those weights are, and how the increase in bankruptcy cases comes out. How many are individual cases? How many are small businesses, how many are Braniff, how many are W. T. Grant, et cetera?

So I am afraid, Mr. Velde, that such question would have to be pursued by someone who is in possession of those statistics and can analyze that and come up with an answer in the light of that kind of evaluation.

Mr. **Velde**. It appears that the Supreme Court has given the Congress an opportunity to review the adequacy of current bankruptcy organizational structure. This does suggest that some of these other questions might also be looked at, and we are trying to repair some of this constitutional infirmity.

Mr. **Hruska**. I would think so. The committee and its chairman, the subcommittee and its chairman, I think proceeded well by limiting the scope of these hearings, as I understand it, pretty much to this single issue, about article I and article III.

There are various aspects of the 1978 act which could be looked into in the light of the experience even of the last 3 or 4 years. Certainly 2 full years could be scrutinized for the purpose of adding to the agenda—to add and study and decide what to do in the light of the experience of these last couple of years.

Mr. **Velde**. Thank you.

Senator **Heflin**. Thank you, Senator. We appreciate you coming. It is always a pleasure to see you.

[The prepared statement of Mr. Hruska follows:]

PREPARED STATEMENT OF ROMAN HRUSKA

Mr. Chairman and members of the subcommittee, I am Roman Hruska of Omaha, Nebraska and I am of counsel to the law firm of Kutak Rock & Huie. I am accompanied by Gregory W. Searson, a partner in the firm who is chairman of our commercial practice department.

It is with due respect and I address this Committee. For two decades, I served as one of its members. During that tenure I developed an abiding interest in the judicial system and the fashion in which it functions, and in all of its aspects -- substantive and procedural. One of my assignments was membership of this subcommittee's predecessor, the Subcommittee on Judicial Machinery, which initially processed the Report of the Commission for Revision of the Bankruptcy laws. The extended hearings on that Report formed the basis of the bills proposed to implement the Report's recommendations. The Senior Senator from North Dakota chaired that Subcommittee and introduced the first bill on the subject. The bill resulted in legislation found in the Bankruptcy Reform Act of 1978.

In other similar exercises, my assignments included membership and activity of two Commissions: (1) for Revision of the Federal Criminal Code and (2) Revision of the Federal Appellate Court System, which I chaired.

It is from this vantage point that I undertake to speak on the subject at hand.

In recognition of the limitations on the subcommittee's time, we respectfully ask permission to submit our statement for the record and to summarize it orally. We will, of course, be pleased to respond to the subcommittee's questions.

We appreciate the opportunity to appear before you today to discuss our suggestions for congressional response to the recent United States Supreme Court decision of Northern Pipeline Construction Co. v. Marathon Pipe Line Company and United States. A significant portion of the practice of our law firm is devoted to commercial law and bankruptcy. Therefore, the jurisdiction of the bankruptcy court is an issue of great importance to our firm. Indeed, this issue touches upon our daily practice of law.

Our experience in practicing in the bankruptcy courts as established by the Bankruptcy Reform Act of 1978 (hereinafter "Reform Act of 1978") has been generally favorable. The expanded jurisdiction of the bankruptcy court and the elimination of costly and time-consuming litigation with respect to the summary versus plenary jurisdiction issue have resulted in a more efficient and expeditious delivery of legal services. The changes made by the Reform Act of 1978 were required by the commercial realities of our society because modern business transactions had strained the former bankruptcy court system to the breaking point. The Reform Act of 1978 has greatly aided in overcoming the inadequacies of the former court system.

As part of the Senate's consideration of bankruptcy reforms in the 95th Congress, the Senate Report stated that "[a] major impetus underlying this reform legislation has been the need to enlarge the jurisdiction of the bankruptcy court . . ." S. Rep. No. 95-989, 95th Cong., 2d Sess. 17-18 (1978) The Marathon Pipe Line decision invalidates this fundamental reform of the Reform Act of 1978 by declaring the grant of expanded jurisdiction to bankruptcy judges unconstitutional.

The Marathon Pipe Line decision requires the Congress to act very quickly to resolve an extremely complex constitutional dilemma. There are several available options for congressional response to the Supreme Court decision. Some are more radical than others and certainly, from the viewpoint of bankruptcy practitioners, some are far less desirable than others. The options can be placed into four general categories:

A. Return to the court system as it existed under the Bankruptcy Act.

B. Reconstitute the bankruptcy courts as Article III courts.

C. Amend the grant of jurisdiction to bankruptcy courts to exclude jurisdiction over state common-law actions absent consent of the litigants.

D. Retain the present jurisdictional system with necessary alterations to conform with the Marathon Pipe Line decision.

A. Return to the Court System of the Bankruptcy Act

In responding to the recent Supreme Court decision, the Congress should avoid a solution resulting in a return to the limited bankruptcy court jurisdiction under the prior bankruptcy act. A return to the antiquated and inefficient restricted bankruptcy jurisdiction under prior law would frustrate the aims of the Reform Act and result in needless and expensive litigation in determining what matters could be heard before the bankruptcy court.

There were several obvious drawbacks to the jurisdictional system under the prior bankruptcy act.

First, where the matter could not be handled in the bankruptcy court resort to a nonbankruptcy court was required. This involved costly delays because the nonbankruptcy courts were not equipped to handle the type of bankruptcy issues brought before them. Administration of cases in the various courts vary from jurisdiction to jurisdiction and, in most cases, proceedings in nonbankruptcy courts are paced more slowly with longer intervals between successive steps. Moreover, dockets of the nonbankruptcy courts were more likely to be crowded and subject to postponement in comparison to the bankruptcy courts. Time is of the essence in bankruptcy proceedings, particularly in business cases where a delay can result in substantial unemployment, the loss of business opportunities or the deterioration of assets. Accordingly, resort to nonbankruptcy courts for adjudication of issues can be fatal to a successful case.

Secondly, the expenses in bringing an action in a nonbankruptcy court can be substantial to a trustee or debtor-in-possession. Under the prior bankruptcy act, trustees would often forgo the recovery of assets of the estate because of the difficulties and expenses involved in litigating in distant courts, particularly where the trustee had limited resources with which to finance such litigation.

However, the most serious problem inherent in the division of jurisdiction under the prior bankruptcy act was the expense and delay resulting from the initial determination as to whether or not the bankruptcy court had jurisdiction. Before proceeding with a particular controversy, the bankruptcy court had to determine whether it had summary jurisdiction or whether a plenary suit was required. Whether or not the bankruptcy court had actual or constructive possession of property and thus jurisdiction involved extensive, voluminous and costly hearing. It was burden enough to force the trustee in bankruptcy to bring an action in a nonbankruptcy court but it compounded the trustee's difficulties when the trustee was forced to enter into expensive, time-consuming litigation in order to determine whether the bankruptcy court or nonbankruptcy court was the proper forum. Accordingly, the defendant in such actions often garnered a windfall in settlement negotiations because the trustee in formulating an appropriate offer of settlement had to discount the substantive merits of his case due to the costs involved in merely determining the appropriate forum.

In order to diminish the basis for litigating jurisdictional issues which consumed so much energy and effort, the Reform Act of 1978 provided comprehensive jurisdiction to the bankruptcy court which should not now be abandoned in formulating a legislative response to the Marathon Pipe Line case. The Marathon Pipe Line case certainly does not suggest that a return to the former court system is mandated. Rather, the Reform Act of 1978 should be refashioned to preserve the comprehensive jurisdiction as far as possible and to insure the continued efficient and orderly administration of bankruptcy cases.

B. Establish Bankruptcy Courts as Article III Courts

As an alternative response to the Supreme Court decision, the Congress could establish bankruptcy courts as Article III courts. The structure of the bankruptcy courts as established by the Reform Act of 1978 was one of the most difficult and intensively debated issues before the Congress. The structure of the court as it presently exists was the result of compromise between the House of Representatives, which favored Article III status for the bankruptcy judges, and the Senate which favored nontenured bankruptcy judges.

If considered only from the perspective of the bankruptcy practitioner this solution would be acceptable. Technically, the most direct resolution of constitutional dilemma created by the Marathon Pipe Line case would be to make the bankruptcy courts Article III courts. The decision of the Supreme Court does not suggest there would be a constitutional problem in doing so and there would be no impediment to vesting comprehensive jurisdiction in Article III bankruptcy judges. However, the practicalities of this solution present a very perplexing situation. The Marathon Pipe Line decision sets a deadline of October 4, 1982 for compliance. It is virtually impossible to select and appoint Article III judges by that date. Furthermore, "folding-in" by appointment of present judge personnel into Article III status would, to a high degree of certainty, not meet with congressional approval. As a matter of fact, not even the number of such Article III bankruptcy judges has been agreed upon.

C. Narrow the Grant of Jurisdiction to Bankruptcy Courts

A compromise solution is offered by Chief Justice Burger's dissenting opinion in the Marathon Pipe Line case. The Chief Justice has suggested that the jurisdiction of the bankruptcy court be narrowed slightly to exclude ancillary state common-law actions and to require that such actions be litigated in the United States District Courts. While this solution may not result in a resurrection of all of the problems entailed in the former controversies of summary versus plenary jurisdiction, certainly litigants would again encounter significant problems in determining whether the bankruptcy court had jurisdiction over a particular matter. This is a specific problem which the Reform Act of 1978 was intended to cure. The solution suggested by the Chief Justice, therefore, is not without its drawbacks.

D. Retain Present Jurisdiction of the Bankruptcy Court

If we begin with the premise that jurisdiction of the bankruptcy court ought not be narrowed, we must explore alternative solutions to the Supreme Court's decision. The optimum resolution of the problem is to retain the jurisdiction of the bankruptcy courts as nearly as possible as provided in the Reform Act of 1978. We believe that with some fine tuning such jurisdiction may be retained, notwithstanding the decision of the plurality in the Marathon Pipe Line that "such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Article III courts." The Supreme Court also concluded "that §241(a) of the Bankruptcy Act of 1978 has impermissibly removed most, if not all, of 'the essential attributes of judicial power' from Art. III district courts, and has vested those attributes in a non-Art. III adjunct."

To overcome that judgment we suggest the following modifications for your consideration:

1. Standard of Review of Bankruptcy Court Decisions

The Reform Act of 1978 is silent as to the standard of review for bankruptcy court decisions. Presumably, the appropriate standard is the one set by Rule 810 of the Rules of Bankruptcy Procedure for review of findings of fact made by a referee--the clearly erroneous standard. However, we believe that the grant of jurisdiction to bankruptcy courts by the Reform Act of 1978 can be sustained as an appropriate exercise of congressional power to create adjuncts to Article III courts if review of the decisions of the bankruptcy courts is subject to de novo determination by Article III courts on appeal.

There is support for this position in the opinion of the plurality in the Marathon Pipe Line case. The opinion distinguishes the holding of United States v. Raddatz, 447 U.S. 667 (1980) in which the 1978 Federal Magistrates Act was upheld as not violating the constraints of Article III. A significant underpinning of the holding in Raddatz was that decisions of the magistrates were subject to de novo review by the district court--the Article III court was free to rehear the evidence and to call for additional evidence. Moreover, in the Marathon Pipe Line concurring opinion of Justices Rehnquist and O'Connor, reference is also made to "only traditional appellate review" as a reason for concluding the bankruptcy court to be improperly constituted as an adjunct of an Article III court. By permitting direct de novo appeal to an Article III court "the essential attributes of judicial power" are retained by the Article III court and "the ultimate decision is made by the district court." United States v. Raddatz, 447 U.S. at 683.

Therefore, in light of these signals from the Supreme Court decision, a possible remedy is to provide that decisions of bankruptcy courts be subject to de novo review by Article III courts.

In footnote 39 of the opinion of the plurality, the Court rejected the proposition that Article III would be satisfied as long as "some degree of appellate review is provided." The plurality stated:

> Our precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law as well as the nature of the case as it has been shaped at the trial level.

However, de novo review would not restrict the Article III appellate court to "considerations of law" or to "the nature of the case as it has been shaped at the trial level." The Supreme Court has stated that de novo determination "means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy." United States v. Raddatz, 447 U.S. at 690. Therefore, de novo review by an Article III court may well satisfy the concerns of the plurality.

2. Appellate Procedure

Pursuant to the amendments to Title 28 as enacted by the Reform Act of 1978, appeals from decisions of bankruptcy courts may been made in three ways: (1) to a panel of three bankruptcy judges if such a panel was appointed by the circuit council of the circuit courts (28 U.S.C § 160), (2) to district courts in districts for which panels have not been appointed (28 U.S.C §1334), and (3) directly to a circuit court of appeals if the parties to the appeal so agree (28 U.S.C §1293). Retaining the present scope of jurisdiction in the bankruptcy courts may be more palatable to the Supreme Court if parties aggrieved of a decision of a bankruptcy court had the opportunity to directly appeal to an Article III court. Therefore, we recommend abolition of the appeal to a panel of bankruptcy judges for the reason that the panels are not Article III courts. In addition, direct appeal to the circuit court should be abolished in light of establishing de novo appellate review proposed herein.

3. Amend 28 U.S.C. §154

The two elements of Article III courts designed to protect judicial independence are the grant of life tenure to the judges subject to removal only by impeachment and a guaranty of compensation which can not be reduced. To more firmly establish bankruptcy courts as adjuncts to Article III courts, the Congress may wish to consider granting bankruptcy judges one of the attributes of Article III judges--a guaranty that their salary is not subject to reduction. The current provision of 28 U.S.C. §153 providing for 14-year terms for bankruptcy judges could be retained.

4. Control of Bankruptcy Courts by Article III Judges

One of the most significant concerns of the plurality's Marathon Pipe Line decision was that the bankruptcy court as an adjunct of the district court was not subject to sufficient control by the Article III district court. Without narrowing the scope of jurisdiction of the bankruptcy court or seriously compromising the independence of the bankruptcy court, some further controls by Article III courts may be added to satisfy the such concerns.

i. Appointment of Bankruptcy Judges

> Under the Bankruptcy Act, bankruptcy judges were appointed by judges of the district courts for six-year terms. In considering bankruptcy reforms during the 95th Congress, both the House and the Senate concluded that the system of appointment of

bankruptcy judges needed to be restructured. In particular, the Senate Report noted that the district court appointment of bankruptcy judges fostered an image of the bankruptcy court "as the stepchild of the district court" and reforms were necessary "to eliminate both the real and apparent dependency and subservience of the bankruptcy court" upon the district court. S. Rep. No. 95-989, 95th Cong., 2d Sess. 16 (1978)

The Reform Act of 1978 provides that effective April 1, 1984, bankruptcy judges will be thereafter appointed by the President with the advice and consent of the Senate with due consideration given to the recommendations and nominations of the judicial council of the circuit within which the appointment is to be made. A bankruptcy judge is subject to removal for incompetancy, misconduct, neglect of duty, or physical or mental disability upon an order by the judicial council of the circuit. 28 U.S.C. §153.

One of the reasons cited by the Supreme Court in United States v. Raddatz in support of its conclusion that the 1978 Federal Magistrates Act did not violate Article III was that the magistrates were appointed and subject to removal by the district court.

S. 2266, the Senate bankruptcy reform legislation of the 95th Congress, provided that the court of appeals of each circuit would appoint bankruptcy judges in its circuit and a bankruptcy judge is subject to removal by the judicial council of the circuit upon the same grounds as those provided in 28 U.S.C. §153. We believe the appointment and removal provisions for bankruptcy judges as contained in S. 2266 should be adopted.

Appointment by the circuit court would retain control by an Article III court over the bankruptcy courts. The presence of such control appears to be one of the hallmarks of the Marathon Pipe Line decision. This would strengthen the concept of the bankruptcy court as an adjunct of the Article III court system. Appointment by circuit judges instead of district judges avoids the problems encountered under the former system wherein district judges had direct appellate review of the decisions of their appointees.

ii. Delegation of Jurisdiction to Bankruptcy Judges

The plurality's decision in the Marathon Pipe Line case observes that the 1978 Federal Magistrates Act which was upheld in the Raddatz case provides that magistrates heard motions only upon reference from the district court. This reference system is apparently another factor in the conclusion of the Raddatz court that magistrates were subject to sufficient control by an Article III court.

As discussed earlier, for compelling reasons the Congress deemed it imperative that the bankruptcy courts established by the Reform Act of 1978 be given comprehensive jurisdiction. As amended by the Reform Act of 1978, Title 28 establishes bankruptcy courts as adjuncts to district courts. The district court has original jurisdiction of all cases and civil proceedings arising under Title 11 or arising in or related to cases under Title 11 and this jurisdiction is automatically delegated to the bankruptcy court.

The Marathon Pipe Line decision appears to place importance upon the specific delegation of authority to federal magistrates by Article III and observes that such a narrow assignment of authority is at odds with the broad grant of jurisdiction to the bankruptcy court under the Reform Act of 1978. We believe the jurisdictional grant to the bankruptcy courts would be more acceptable to the Supreme Court and more in conformity with its prior decisions if the district court had the option to retain jurisdiction of bankruptcy cases. Under 28 U.S.C. §1471 the district court does not presently have this option.

Another way to address the Supreme Court problem of the automatic delegation of all jurisdiction to the bankruptcy court would be to return to the former system and provide that each bankruptcy case must be specifically referred from the district court to the bankruptcy court. This second approach may produce a more onerous administrative burden. Instead, granting the district courts the option of exercising jurisdiction over bankruptcy proceedings may be the appropriate compromise to overcome Article III infirmities.

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In summary, we have attempted to outline available alternatives for congressional response to the Marathon Pipe Line decision. Because a return to the pre-1978 jurisdictional scheme would completely frustrate the reforms instituted by Congress in its enactment of the Reform Act of 1978, we have suggested that this alternative be rejected by Congress.

Reconstituting the bankruptcy courts as Article III courts undoubtedly has some merit. However, that approach gives rise to the transition problems which are most difficult of solution as was clearly brought out during the course of the first day of hearings on this issue.

As an alternative, we have suggested a continuum of several responses. It is beyond question that the current comprehensive grant of jurisdiction to the bankruptcy courts has worked effectively. Therefore, we believe that the present grant of jurisdiction should not be narrowed except the extent necessary to comply with the Supreme Court decision. Instead, we have suggested changes in other facets of the court system. Those changes have been suggested with the goal of retaining the essential attributes of judicial power in Article III courts so that the bankruptcy court may be properly constituted as an adjunct to an Article III court. In that regard, our suggestions are as follows:

1. provide for de novo appeal of bankruptcy court decisions by an Article III court;

2. provide for direct appellate review of bankruptcy court decisions by an Article III court;

3. provide for appointment of bankruptcy judges by the circuit courts and removal of bankruptcy judges by the judicial council of the circuit in which the appointment is made;

4. grant jurisdiction over all proceedings under Title 11 to the district court and provide for (1) referral to bankruptcy judges subject to the option that the district court may retain jurisdiction or (2) provide that each case must be individually referred by the District Court to the bankruptcy court; and

5. provide for protection against diminution of compensation of bankruptcy judges.

We hope we have been of assistance to the subcommittee in exploring possible reforms. Mr. Chairman, we would be pleased to respond to any questions members of the subcommittee may have.

Senator **Heflin**. Now we will have Mr. Martin Redish, professor of law at Northwestern University, and Richard Levin, attorney at law from Los Angeles, Calif., to come forward.

We appreciate your appearance. Proceed, if you will. We will be delighted to hear from you.

Your written statements, if you have any, will be entered into the record, and Senator Hruska's statement will be entered into the record.

So, if you will, if you can, summarize rather than reading from the statement.

STATEMENTS OF MARTIN REDISH, PROFESSOR OF LAW, NORTHWESTERN UNIVERSITY, CHICAGO, ILL., AND RICHARD LEVIN, ATTORNEY AT LAW, STUTTMAN, TREISTER & GLATT, LOS ANGELES, CALIF.

Mr. **Redish**. Thank you, Mr. Chairman.

What I have decided to do is read selected excerpts from the statement.

On June 28, 1982, the Supreme Court decided the case of *Northern Pipeline Construction Company* v. *Marathon Pipeline Company,* holding that, as presently structured, the bankruptcy courts created by the Bankruptcy Reform Act of 1978 could not constitutionally exercise all of the jurisdiction vested in them by that act.

The decision creates a serious and immediate problem for Congress, because the Court delayed the effect of its decision until October 4 of this year, in order to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication* * *." Of most immediate concern to Congress, then, is how it can revise the method for adjudication of bankruptcies in a fair and efficient manner while at the same time complying with the constitutional constraints set out in *Northern Pipeline.*

My testimony is divided into three sections. First, I will explore exactly what the decision held, and why. This is far from a simple task, both because of the fact that four separate opinions were written and because the opinion of Justice Brennan announcing the decision of the Court is ambiguous in its actual holding, as well as in its reasoning. The second portion of my testimony will critique the theoretical rationale of Justice Brennan's opinion, and consider some of its serious implications for the allocation of Federal judicial power in general I will omit any references to this in my oral statement.

Finally, my testimony will examine the conceivable options that I believe may be available to Congress, considering the various advantages and disadvantages of each, as well as the chances that each would ultimately be upheld by the Supreme Court. In the course of this analysis, I will also discuss what might happen if Congress fails to take any action by October 4.

As previously noted, four separate opinions were written in *Northern Pipeline,* and this fact may be of great significance in deciding what Congress can and cannot do at this point. Most importantly, Justice Brennan's decision announcing the judgment of the Court was not a majority opinion; it represented the views of only four Justices. Three Justices dissented, expressing the view that, even as constituted under the 1978 act, the bankruptcy courts were constitutional. Justice Rehnquist, in an opinion joined by Justice O'Conner, concurred separately, on grounds arguably narrower than that of the plurality. Thus, a combination of the three Justices in dissent and the two in concurrence made up a majority of the Court, and this fact may broaden Congress options beyond what they would have been had Justice Brennan spoken for a majority of the Court.

Justice Brennan's opinion begins as if it is deciding much more than whether the bankruptcy courts can adjudicate State common law claims involving the bankrupt. His opening statement is: "The question presented is whether the assignment by Congress to bankruptcy judges of the jurisdiction granted in subsection 241(a) of the Bankruptcy Act of 1978 * * * violates article III of the Constitution." 50. U.S.L.W. at 4893. That provision of the act refers to all of the bankruptcy courts' jurisdiction, not merely its jurisdiction over common law claims involving the bankrupt, even though the *Marathon Pipeline* decision dealt only with such claims. This is detailed in my written statement.

If Justice Brennan's ultimate conclusion was as broad as the initial question, Congress options might not include the retention of the present system of bankruptcy courts with merely the excision of common law claims involving the bankrupt. But, whatever its merits, Justice Brennan's reasoning tends to indicate that his final decision was not nearly as broad as his initial inquiry.

Whatever its merits, *Northern Pipeline* represents a constitutional holding of the Supreme Court, and Congress must now deal with it. In my view, Congress presently has available five conceivable options, all of which contain potential drawbacks and all but one of which continue to be plagued by constitutional doubts. These options are as follows:

First. Declare all of the judges in the bankruptcy courts to be article III judges, with all of the constitutional protections required by that article.

Second. Retain the current structure of bankruptcy courts as non-article III bodies, but remove from those courts jurisdiction to adjudicate all State common law claims involving the bankrupt, and instead vest jurisdiction to adjudicate those claims in the Federal district courts.

Third. Provide article III status to a segment of the bankruptcy judges, and have those judges adjudicate the common law suits against the bankrupt, while the non-article III bankruptcy judges continue to distribute the bankrupt's assets.

Fourth. Retain the combination of summary and plenary jurisdiction, but abandon the present structure of bankruptcy courts in favor of a system comparable to the pre-1978 "judge—referee" system.

Fifth. Abandon entirely the 1978 act's adjudication structure in favor of a completely administrative system, with final enforcement of the administrative agency's order in an article III court.

I will proceed to consider the relative advantages, disadvantages, and constitutional problems of each of these options.

In a constitutional sense, at least, the first option is by far the easiest. There can be no doubt that the subject matter of the bankruptcy court's jurisdiction falls within the limits of the Federal judicial power, and the Court in the past has shown itself receptive to apparent changes in congressional intent concerning the article III status of Federal judicial bodies.

Of course, the imposition of article III status on all bankruptcy judges may impose burdens on Congress that make the alternative unattractive, because the judges will then receive the constitutional protection of life tenure and unreducible salary. But if one of the goals of the 1978 act was to increase the prestige of these judges, surely there is no better way to accomplish this goal than to provide article III status.

Moreover, each of the remaining alternatives also involves one or more practical drawbacks, and—of equal importance—each of those alternatives is likely to result in future litigation, leaving the method of bankruptcy adjudication in a state of constitutional flux for years to come. The greatest advantage of the article-III-status alternative, then, is that it will put an end to the constant uncertainty over the constitutionality of Congress chosen method of bankruptcy adjudication.

The second alternative that I see open to Congress is to retain the article I status of the bankruptcy courts, but to vest their former jurisdiction over common law suits in the Federal district courts. The obvious advantage of this alternative is that it permits Congress to avoid the burdens of imposing article III status on the bankruptcy courts, while simultaneously complying with the thrust of *Northern Pipeline*. For whatever its ambiguities, all that *Northern Pipeline* ultimately decided was that the nonarticle III bankruptcy courts could not adjudicate common law claims involving the bankrupt.

The disadvantages of this alternative, however, are significant. Initially, it defeats one of the important goals of the 1978 act, combining all of the forms of jurisdiction in one judicial body. By keeping these jurisdictions separate, there is a real danger of delay and wasted time and expense. Moreover, this alternative will result in added burdens on the already-crowded district courts, a result Congress was presumably attempting to avoid by passage of the 1978 act.

Finally, although use of this alternative will avoid the actual holding in *Northern Pipeline*, it will not avoid future constitutional challenges. For neither the opinion of Justice Brennan nor the concurring opinion of Justice Rehnquist conclusively indicated whether non-article III courts could adjudicate any of the traditional bankruptcy jurisdiction.

A third alternative is, for constitutional purposes, similar to the second, but presents different practical problems. This alternative is to provide article III status to a certain percentage of the bankruptcy judges, and have those judges adjudicate the common law claims. As with the second alternative, this would avoid the problem created by the actual holding in *Northern Pipeline*. Its comparative practical advantage is that it would not burden the district courts, but its comparative disadvantage is that it would dictate an increase in the number of article III judges, though not as many as if the first alternative were adopted.

The fourth alternative is to abandon the judicial structure adopted in the 1978 act in favor of a system in which the bankruptcy adjudicator—whether called "judge" or "referee"—is brought more closely under the control of the Federal district court, which would have the ultimate authority to adjudicate bankruptcies. The advantage of this alternative is that it might well allow Congress to retain the benefits of a combination of all of the bankruptcy jurisdictions, though the system would no doubt be subjected to constitutional attack.

The practical drawback of such an arrangement is that it takes away from the bankruptcy courts the very elevation in stature that the 1978 act was designed to provide. Moreover, such a procedure still presents serious constitutional questions.

Thus, in light of the obscure nature of Brennan's opinion, it is simply unclear whether congressional adoption of a referee scheme, with a consolidation of the summary and plenary jurisdictions, would be constitutional.

Instead of adopting the referee-judge scheme, Congress could conceivably replace the entire judicial bankruptcy scheme with a purely administrative system, under which the administrative agency must seek approval and enforcement of its orders in the district court. The comparative practical advantages and disadvantages of such a system are well beyond whatever degree of expertise I possess, but given the ambiguity of Justice Brennan's opinion on the issue, it appears that the constitutional doubts about this procedure are no different from those raised about the preceding alternative.

In my written testimony I include a section on what would happen if Congress fails to take any action by the October 4 deadline. Ultimately, it is a typically long, professorial way of saying "I do not know."

Congress does seem to have several viable options, though none of them may solve the practical difficulties as well as did the system devised in the 1978 act. The first option considered—providing article III status to all of the bankruptcy courts—is in many ways the most advisable, since it would enable Congress to keep the two forms of bankruptcy jurisdiction combined in one forum, to maintain the elevated status of the bankruptcy courts, and to avoid adding undue burdens on the district court. However, if Congress concludes that the burdens and expense that result from use of this option are too great, perhaps the alternative suggested by Chief Justice Burger in his dissent—shifting the suits involving the bankrupt dealing with common law rights into the district courts—may prove to be the least troublesome resolution.

Thank you, Mr. Chairman.

Senator **Heflin**. Thank you, Professor Redish.

I appreciate your very thoughtful presentation, as well as your rare professorial candor.

Mr. Levin, we would be delighted to hear from you.

Mr. **Levin**. Thank you, Mr. Chairman.

I thank the committee for the opportunity to testify and present my views. It is really an honor to be called.

The committee has my written testimony, and as the chairman has indicated, it will be included in the record. So I would like to confine my oral remarks simply to comment on some of the things that Senator Hruska said earlier, and some of the things Professor Redish has said earlier.

My general comment is that every witness in the 94th and 95th Congresses, when the 1978 act was being considered, and so far as I have heard today, and heard about the House and Senate hearings yesterday and the day before, every witness has supported the concept of unified bankruptcy jurisdiction. That seems to be the most important concept What the witnesses have generally been directing their testimony to is how to achieve unified bankruptcy court jurisdiction in view of the *Marathon* decision which requires an article III court to adjudicate some of the sorts of things that are in that jurisdiction.

I am in complete agreement with the concept of unified jurisdiction. I think one of the most important decisions made in 1978 was the expansion of the bankruptcy court's jurisdiction. It has been a great time and expense saver. It was not the lawyers' relief bill that everybody thought. But, to the contrary, trying to divide the jurisdiction could well be a lawyer's relief bill.

If Congress is to draw a line based on *Marathon,* to divide the jurisdiction of the bankruptcy court to matters that require de novo review, and those that do not require de novo review, or matters that might be heard in another court in the first instance, I do not think Congress will be able to draw that line. I think Congress will be able to draw a very large gray area between those two, and lawyers will spend lots of time and lots of expense litigating whether something falls in the gray area, or on either side. They will also spend as much time litigating and determining whether a particular matter that falls on one side or the other of the gray area, if that placement of that item is constitutional under *Marathon.*

So whereas we now have a lot of arcane law on the subject of summary and plenary jurisdiction, we would have continued litigation over the gray area, and the added litigation over whether that gray area was constitutional. I think it would be years before the appellate courts and the Supreme Court in particular could resolve that. That has got to create practical problems in bankruptcy administration, in terms of time and expense.

The Supreme Court's decision, at a minimum, covered State created common law rights, as well as the collection of a bankruptcy estate. Accounts receivable, claims for breach of contract, recovery of property that has been repossessed by a secured creditor, fraudulent transfer litigation, bulk sale litigation which brings a lot of assets into an estate, all of these are rights which are incorporated into the bankruptcy code through various provisions of subchapter 3 of chapter 5.

There would be tremendous delay in administration and, of course, it would affect very severely the reorganization ability of business debtors. When the patient is on the operating table bleeding, you need to have the surgery, and not argue about which doctor should perform.

So I too, with all the other witnesses, support unified jurisdiction.

So let me turn to the proposals that could change that. First, of course, is the article III court. There is no constitutional problem that I can see with that.

Responding to your earlier question to Senator Hruska, even if article III bankruptcy judges were made substantially inferior in salary or perquisites, or whatever, to the district judges, as long as they have the two attributes that the constitution requires, that is, tenure during good behavior and irreducible salary, Congress has substantial flexibility as to what it can do in other areas to comply with article III. I think, as you called it, with some hesitation, some inferior article III court would be cleary constitutional.

Other proposals all talk about somehow giving the district court, or an article III bankruptcy court with a small number of judges, review power over the decisions of the trial level of bankruptcy judges. The most frequently heard phrase is de novo review.

Well, de novo review has to involve the hearing of the matter by the trial judge in the first instance, including the preparation of findings and conclusions and perhaps a written order. Then the litigants have to go through the same process all over in the court that is giving de novo review. The review has to be meaningful, and it cannot be a rubber stamp.

If we are going to have meaningful de novo review, it would save creditors and debtors and lawyers much time and expense to put the jurisdiction directly in the reviewing court in the first instance. Indeed, the *Marathon* case itself was pending in Federal district court in Kentucky before Northern Pipeline filed its bankruptcy or chapter 11 in Minnesota. The case was then recommended there. As Professor Redish has pointed out in his statement in many instances there may be independent grounds of Federal jurisdiction.

Why try a case twice? Let us be direct and put the cases into Federal district courts, if it is felt Congress cannot create article III bankruptcy courts. Of course, if Congress does that, we have bifuricated the jurisdiction, and we have the large gray area again. That is no different than creating de novo review, because nobody can tell now what matters will require de novo review and what matters will not.

If everything requires de novo review—objections to discharge, objections to exemptions, exceptions to claims, other kinds of small contested matters—the burden could be staggering. I have statistics from the Central District of California, which encompasses seven counties—in southern California, including Los Angeles. Those statistics indicate that in the first 9 months of fiscal 1982 there were 12,000 adversary proceedings filed in the Central District of California. If even 25 percent of those had to have de novo review at the district court, you can imagine what it would do to the district court's caseload, and that was just the first 9 months of the year, and that does not include all of the contested matters. It is only adversary proceedings, which is a small subset of the litigated matters that have been in the bankruptcy courts.

So de novo review is certainly possible, but I do not think it is much more possible than dividing the jurisdiction and placing it in the district courts, or State courts in the first place.

There was discussion of transition problems. There are three Supreme Court cases which give some support to those that would have a transition provision. I think Senator Hruska is right, you cannot implement an article III court system by October of this year. But in *Glidden* v. *Zdanok,* in Judge Harlan's plurality opinion, the last major opinion in this area of the law, he read all the prior cases, especially Chief Justice Marshall's opinion in *American Insurance Co.* v. *Canter,* to say that the concept is the need to exercise jurisdiction, then and there for a transitory purpose. Those are his words.

Well, if we are talking about a transitory purpose for a year, or even 18 months, or what it would take to get the bankruptcy court divided, I think *Glidden* and another case called *Metlakatla Indians* v. *Egan*—holding the jurisdiction of the Territorial Court of Alaska, after Alaska became a State, until the Federal district courts could be established—and the stay of execution in *Marathon* itself, all lend support to the idea that while moving from one court system to another, it is permissible to operate in a system that would not be permissible if it were permanent. It still may be advisable to provide for de novo review during that transition period, but it would only be a short disruption of the process, not a permanent de novo system that could cause problems.

I would like to conclude on one of the points that Professor Redish raised. It was raised frequently in the House and the Senate in 1978. That is the prestige of the bankruptcy court. It is next to impossible to calculate with precision how many creditors, how many debtors, and how many dollars are involved in bankruptcy at any one time. Certainly a large number are involved in the smaller cases, consumer bankruptcies, chapter 13 cases.

Then there are cases like Saxon Industries, Braniff, Wickes Corporation, Itel Corporation, Sambo's. Let us take Wicks. It is the biggest. It has in excess of $2 billion in debts. It has well in excess of 20,000 employees. These are important cases. These are no less important cases than the AT&T antitrust case or the IBM antitrust case, or many of the matters in the Federal district courts.

I think everyone recognizes article III courts, even if it had lower salary, will attract the best judges. The thousands of individuals and companies, and the billions of dollars that are involved deserve the best justice that the Federal Government can give them. They do not deserve second rate justice. I think that is one of the very important considerations in establishing any sort of court, and staffing it properly.

I am happy to respond to questions.

Senator **Heflin**. Thank you, Mr. Levin. We appreciate your testimony.

Let me start by asking you, of course, you raised the issue of the problems of de novo, and you cite the instance of cases. You have, of course, a lot of de novo appeals in various State courts. Some in Federal court.

You say you make a valid argument against any interlocutory appeal that might be done. I, just speaking from recollection, I may be wrong, but generally in some cases the de novo appeals from an inferior court to a court of original jurisdiction, trial court, amounts to about 10 percent, and then—I will ask you this, which I asked a witness yesterday, do you think there are peculiarities of bankruptcy which would cause more of a higher percentage of de novo appeals than the normal civil case?

My figures may be wrong. I am not saying they are right. But whatever the general figure has been on de novo appeals, are the peculiarities of the bankruptcy law and the bankruptcy trials—will they involve a higher percentage of de novo as opposed to the normal civil case?

Mr. LEVIN. Yes; I think they are, and perhaps I can give some examples of my experience, and the experience of my firm.

In a bankruptcy case, very frequently companies that owe money to a company that goes into bankruptcy take the view, rightfully or wrongfully, "Sure, I owe money, but I am not going to pay unless they sue me." They feel that the company has gone into bankruptcy, and the effort to collect the money that is owing the bankrupt will be diminished, and frequently they are correct.

One of the reasons they are correct is because time is on their side. A trustee has to attempt to wind up an estate. A reorganization case has to work quickly, and if the defendant can create enough delay, he can get out of paying it, or he can get out settling very cheaply. That kind of dynamics is not always present in the ordinary civil case, because there is usually a substantial dispute about whether the money is owing.

We have one case in my office where the attorney litigating it has said to me, sure, we owe them money. We have no defense. My only hope is to raise the constitutional jurisdictional question, send them to State court where we cannot get to trial for 5 years, and then settle cheap. That is what is happening, and that is why it is different from ordinary civil practice.

Senator HEFLIN. I do not know. I have seen that used in ordinary civil practice, in the same manner. There are many instances where the end result is settling cheap.

Suppose there is a demarcation of types of de novo in which you could have, and I am not sure how this would be drafted, but you could have some on the record as a de novo, and some on which it would be heard completely de novo, by witnesses, and so forth.

Are there problems with that form of approach?

Mr. LEVIN. Well, it would certainly expedite. It would avoid a second trial. I am not sure it would stand up to constitutional challenges if the parties were not given a complete second chance. But I do have another problem, and that is it requires, in essence, the winning party to take the appeal, because if the moving party has a right to a de novo review in every case, then no writ of execution can issue until the review has taken place. So the winning party, who wants the writ of execution, has to take the review. That turns the judicial system on its head.

Senator HEFLIN. I do not follow you.

Mr. LEVIN. If a bankruptcy court cannot exercise judicial power—one of the sentences in Justice Brennan's opinion, quoting from Justice Taney, "one of the essential elements in the exercise of jurisdiction is the exercise of the writ of execution." That is where the real crunch comes.

Certainly administrative agencies can hear disputes, But if the losing party does not abide by the decision, it is the agencies that must take the enforcement action to the court of appeals, and that is a very common practice in administrative hearings.

So if the court does not have the judicial power to issue a writ of execution, then the losing party simply has to say, I will not pay it, go get your writ, and then the winning party has to go to the district court to get the writ, and the losing party will seek to delay it by some sort of de novo review.

Senator HEFLIN. Could you provide for language that in the event of the failure of a losing party, within a certain period of time, to exercise an appeal, that the finding will be presumptive and writs will not be issued by the district court judge?

I just wonder. It seems to me that is possible. They may have problems, but this may be something that depends on how the statute is drafted.

Mr. LEVIN. It certainly is possible, but I would defer to Professor Redish's expertise. I have my own views. I am not persuaded that it is constitutional. But I would defer on a question of that nature.

Senator HEFLIN. Let us take a chapter 11 type of a proceeding, a reorganization. You end up with de novo appeal.

What problems do you see with that, and what procedures possibly could be drafted to prevent some problems?

Mr. LEVIN. It is difficult to say. The problem I see in the ordinary run of the mill case that is not the giant one, but in the ordinary course, the problem is time. When district courts had appeals to decisions of bankruptcy courts under the old act, before 1978, they did not have any de novo review, but merely reviewed the law, and handled it in effect in motion form. The general experience was that that appeal languished, they languished for a long time. For constitutional reasons, district courts have to give priority to criminal matters, and nobody would challenge that.

But with the press of the other court business, plus the lack of interest in bankruptcy matters, that could cause matters to languish, and in a chapter 11 the key to reorganization is infusing new working capital to get the business going again. Without the capital it cannot develop, cannot sell a product, and get back on its feet again. People do not invest capital when litigation is still pending. It has got to be completed. That is the main problem. It will cause delay, and thereby debilitate the reorganization process.

Senator HEFLIN. Did you foresee that there can be constitutional problems under this marathon case if, say, the present bankruptcy judge is given factfinding ability, but the application of the facts to the law would in effect become an article III judge function in some way?

It may be de novo. It might be on a question that someone suggested, of certifying questions.

Professor, I might continue and ask Mr. Levin all these. I started off because he had gotten into the de novo situation. But I think if you feel you want to answer——

Mr. REDISH. Well, if I could, I do have two thoughts on the de novo issue.

I think there is an element of ambiguity when we use the term de novo review, and you were referring to it before. In its pure sense, it is, as Mr. Levin described it, a totally new proceeding, with all the evidence reintroduced. And I think that is the way Chief Justice Hughes described it in the Crowell decision.

I think the concept that has come to describe—the way you were referring to it, review on the record, but with no deference to the decisions or findings of the lower court, or body. My reading of Justice Brennan's opinion in *Northern Pipeline* is that the latter type of de novo review would most likely be constitutional.

In footnote 39 of his opinion he rejected dissenting Justice White's opinion that the article III requirements are satisfied by the availability of appellate review, emphasizing that, and I am quoting, "Our precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal."

It seems to me that even a de novo level of appellate review would not be satisfactory.

Now, what I see as the main contradiction in this opinion is that earlier he cites as one of the bad aspects of the structure that there is only a level of clearly erroneous appellare review.

One might think that that implies a stricter standard of review, such as de novo, would be constitutionally satisfactory. Nevertheless, in footnote 39 he seems to be saying that no appellate review would be enough. I am not sure whether the other form of de novo review, the pure sense of not reviewing on the record, but establishing a new record, would be adequate. In distinguishing the magistrate system, Justice Brennan emphasizes in part that the district court has the authority to review, to rehear the evidentiary findings of the magistrate, but emphasizes a number of other factors which he suggests makes the magistrate an appropriate adjunct, but makes the bankruptcy court, as presently constituted not appropriate.

In other words, the magistrate is held on a much shorter leash by the article III judge than was the bankruptcy court. The mere creation of a de novo review in the article III court without the additional controls that the district court exercises over the magistrate might not meet Justice Brennan's standard.

Senator **Heflin**. I am a little bit intrigued with your suggestion of a limited number of article III judges, than with adjunct judges.

We look at the present situation. You have so many—200-some-odd bankruptcy judges. They are coming up here for appointment. If you created as you mentioned 100 and suppose you were to keep all the present bankruptcy judges. You could provide for this 14-year appointment or not. You may want to put them in a category of—I believe it is 8 years for magistrates, and create a number of additional article III judges, whose primary function would be in the field of bankruptcy.

These would, in effect, serve the present bankruptcy judges, and would in effect be equivalent of magistrates.

What problems do you see with that sort of thing? You in effect are limiting the new judge to the new article III judges that would be handling bankruptcy—limiting them to bankruptcy, but that if you created—we will say 200 bankruptcy judges, and 50 article III district court judges, that would have also the authority to try other types of cases, but their primary function would be in the field of bankruptcy, or else you could have a rotating system, or various systems.

I am sure we have those statistical analyses, and everything else would be just guesswork.

How would such a system, as you envisaged it, work? You raised the possibility of a system of creating a lesser number. You mentioned 100. Let us take 50, and you keep the same number of bankruptcy judges, keep them in place, and in effect make them special bankruptcy magistrates, with certain powers, different from other magistrates.

How could such a system work?

Mr. **Redish**. Well, Mr. Chairman, as you describe it, I think that was not exactly my suggestion.

Senator **Heflin**. It is just an alternative.

Mr. **Redish**. It is, I believe, preferable to my suggestion. As you said to Senator Hruska, give magistrates to a limited group of article III bankruptcy judges. You would set up a limited number of article III judges, thereby not reducing Congress' flexibility as much as if you turned them all into article III judges. Whether you call the others referees, bankruptcy magistrates, or article I judges, you could have a larger corps of them, as long as they were sufficiently under the control of these new article III bankruptcy judges, in much the way the magistrates are.

I think that would meet constitutional standards. The new article III bankruptcy judges would have the final say, perhaps the ability to appoint the article I referee, magistrates, whatever, much the way the article III judges do with regular magistrates. I think that would meet constitutional standards, and perhaps would not cause as many practical difficulties as making all of these individuals article III judges.

Mr. **Levin**. If I may comment on that, Mr. Chairman, it would have the same kind of problems that de novo review would have, if they were in the district courts.

In other words, their functions would be somewhat limited, and you would be trying cases twice. But it certainly seems to me preferable to separate that from the ordinary business of the district courts, because of the treatment that bankruptcy has generally received, being placed on the bottom of the calendar.

But if I can take your idea one step further, one of the goals of the bankruptcy commission was that the many things that go on in bankruptcy are administrative in nature, and do not require judicial decision, and some of the things could be worked out at an administrative level. The bankruptcy commission proposed an administrative body in the executive branch to handle these things. Only an actual litigable dispute would go to a bankruptcy court. That kind of court could be an article III court, and the number of judges could be less because of the large number of minor types of things judges hear.

I think it would be preferable to a bankruptcy magistrate system, perhaps, because the administrative process might be easier to deal with than the judicial process at a lower level, at a subordinate level with all that that entails. It is something perhaps worth pursuing, although I still think the better alternative is to create the full court system, as the Supreme Court suggests, and I do not mean suggest to be a strong word in this case.

Mr. **Redish**. Mr. Chairman, if I might add one point to that.

In commenting on Mr. Levin's suggestion that the creation or a limited number of article III bankruptcy judges with effectively a magistrate system would require trying the cases twice. I am not a practitioner, but having spoken to a number of lawyers and judges, if we analogize to the magistrate system, that would not be a dangerous practice.

The Supreme Court seems to be satisfied, both in *Raddatz* and here in *Northern Pipeline,* with the fact that the district court has the potential authority to review what the magistrate does.

My impression is that it might be more of a rubber stamp than perhaps it should be, but certainly the district court does not retry all of the decisions of a magistrate, and I see no reason why it would have to be any different in the specialized area of bankruptcy.

Mr. **Levin**. I think that might be because of the limit on the magistrates' jurisdiction—I am not an expert here and I may misspeak, but the bulk of their trial jurisdiction is by consent. They do a lot of pretrial work, but when it is an actual trial, it is by consent of the litigants, and that is why it is not retried at the district court level.

Mr. **Redish**. That may be true, but not to my knowledge. In a protracted litigation, pretrial decisions may be more important than ultimate trial. Many times there is not any trial at all.

Mr. **Levin**. I will agree and say bankruptcy differs because the kind of litigation that goes on in bankruptcy courts, without meaning to sound perjorative, is quick and dirty. It is quick and extensive pretrial activity does not go on, more so than in ordinary civil litigation. It is very fast.

Senator **Heflin**. Do you think you could consent to jurisdiction?

Mr. **Redish**. You cannot consent to article III jurisdiction. I think what you can consent to is non-article III jurisdiction because that, in effect, is as if the parties had chosen an arbitrator. So it would be perfectly constitutional to say with consent you can have anything normally heard by an article III court adjudicated by a non-article III individual or body because, in effect, the parties have deemed that organization or that individual to be their arbitrator, and I do not think there would be any constitutional objections to a consent aspect.

Mr. **Levin**. It was never upheld as constitutional, but that is what happened under the old law. The two bases for bankruptcy were possession and consent. The law on what constitutes a consent to jurisdiction fills volumes, and it was often done by ambush. People consented to jurisdiction not realizing they were doing it. It was very unfair.

Senator **Heflin**. You mentioned administrative judges. Looking at the overall situation with administrative tribunals, basically within units there is some feeling—there have been studies made that there ought to be an independent administrative law judge pool, that they ought to be selected by an independent body, and that assignment ought to be to administrative agencies to determine cases, pro or con, on expertise. If you created some type of administrative tribunal in bankruptices, as one of you suggests, would bankruptcy judges, with a vast knowledge of—I mean with the vast array of problems that could arise, could the judges be used in effect in a pool to try something like a securities case, though there is not much antitrust now in the field of the Federal Trade Commission.

Should the administrative agency judges, be limited strictly to bankruptcy?

Mr. **Levin**. That is a very difficult question. Certainly when it comes to securities law matters, bankruptcy matters, it may not matter. If it comes to Food and Drug Administration matters or something of a very scientific or technical bent, it may be very difficult. But it comes down to the quality of the people you get. The better the people, the more flexible they will be to hear different kinds of matters. An administrative law judge is not as an attractive position as an article III. Better lawyers are attracted to apply for article III than administrative judges or referees or magistrates or whatever they will be called.

Senator **Heflin**. From a practical viewpoint, if Congress is going to act, say, with article III between now and October 4, I can anticipate the lobbying that will be done by a number of district court judges. Everything will come to a screeching halt and not do anything. We are faced with the situation where we need some temporary approach toward this to give us longer time to study the various alternatives that are surfacing now.

What are your feelings on some temporary basis? Do you have some suggestions? We will say that a temporary proposal would go into effect on October 4 of this year and might be sunsetted in 18 months or something, with a sunset being primarily to force Congress to act with a permanent solution to the problem.

Do you have any suggestions as to interim approaches and temporary approaches?

Mr. **Levin**. I think the validity of any temporary approach depends on what is at the end of the tunnel. If the Supreme Court cannot see a constitutional system at the end of the tunnel, it is not going to permit litigants to go through the tunnel. So, I think a temporary system will work but only if at the same time there is enacted a constitutional system, in whatever form that might be—but a permanent constitutional system because the danger of a temporary system dragging on, even with a sunset provision—there is always danger of extensions—that might not persuade the Supreme Court that Congress had answered the problem other than to say we need more time to study it.

Mr. **Redish**. I would agree, that unless Congress includes within its transitory plan an indication of what it wants to do finally, that the Supreme Court will be less receptive. But in either event, my guess would be that the easiest option on a transitory basis would be a surgical excision of the bankruptcy court's jurisdiction over common law, State created common lawsuits involving the bankrupt, as Chief Justice Burger suggested.

As I indicated in my written testimony, there are significant constitutional questions about that procedure. Justice Rehnquist expressly leaves open what he would do with the bankruptcy courts if he had to rule on whether the bankruptcy courts could adjudicate the dividing up of debtors' assets, and Justice Brennan leaves it open as well.

But as an interim, I would think it is probably likely to be the least disruptive to the present structure and perhaps the most likely other than the article III process, or as a transitory alternative until article III status can be obtained, least likely to be subjected to constitutional attack.

Senator HEFLIN. Do you have any thoughts on what that should be?

Mr. LEVIN. Yes. I would suggest, if there were a constitutional system at the end of the tunnel, that Congress could leave the current system in place and it could continue with its expanded jurisdiction. The three cases I cited earlier are authority for that. If I were incorrect on that, then you could set up the de novo review kind of system that on a temporary basis would be very disruptive of bankruptcy, but for a short time we can live with it.

Senator HEFLIN. Do you think we as a Congress, we could pass legislation to the effect that it is at the request of the consensus of the Congress that the present system be maintained for 18 months but in the event that the courts will not desire to do it, then the fallback position is as follows, a de novo review or something?

Mr. LEVIN. Congress has done that in the past, and I cannot remember how the court came out.

Mr. REDISH. If it has, I am not familiar with it.

In a situation where the Supreme Court has already invalidated this system their previous term, I am not sure how the Court would react to Congress saying we would like to leave that system in effect for the next 18 months.

If Congress does nothing by October 4, the Supreme Court might say, OK, we will have a vacuum. There is no constitutional structure for adjudicating bankruptcies.

Mr. Levin knows better than I, but I would suggest that is an alternative to avoid at all costs. By October 4, Congress should enact some system that it thinks will be constitutional, and then the Court would be more receptive to a transition period. But if Congress, by October 4, takes no affirmative action of setting up a constitutional system, I doubt that the Court would, at least for an extended period, allow the present structure to continue. There is an element of awkwardness in saying bankruptcy can still be adjudicated by an unconstitutional system. That is what the Court said. It put a very short fuse on Congress, quite properly, because of that.

Senator HEFLIN. Do you think they felt between now and October 4 was adequate time or that would be when they come back from their summer recess?

Mr. LEVIN. I doubt that was a coincidence, but I am not sure the Court itself knows what it will do if Congress does absolutely nothing by that date.

Senator HEFLIN. Mr. Velde, do you have some questions?

Mr. VELDE. Thank you, Mr. Chairman.

Professor Redish, I was intrigued by your statement on page 4 where you state it isn't clear from the history and language of our country that Congress need not have created inferior Federal courts and instead could have relied on State courts for at least initial adjudication of Federal law.

As I recall the constitutional precedent of Congress power to regulate bankruptcy, this was an area where the Founding Fathers, in their wisdom, not unlike regulation of interstate commerce, providing for the common defense, regulation of patents and trademarks, declared that this was an area where the States generally were not doing a very good job and there needed to be a uniform Federal pronouncement in the area.

As I recall, debtors commonly were put in prison in several States until they could pay, and this did not work out too well, either from the standpoint of the creditor or the debtor over a long period of time.

Is this really a viable possibility, that we curtail the article III bankruptcy judges' jurisdiction and allow States a more active role?

Mr. **Redish**. First, it is important to distinguish between the role of State law and the role of State courts. I think you are probably right, that the framers would not have contemplated State law controlling bankruptcies. But the history of the creation of article III, where it was decided that Congress need not create these inferior Federal courts on the assumption that State courts would be available, combined with the supremacy clause—article VI—which provides that State courts are bound to enforce Federal law, indicates that if Congress so chose, and it would not be a wise idea to do so, it could have substantive Federal law adjudicated in the State courts and the State courts would be both obligated and empowered to enforce Federal law as they saw it.

I certainly did not mean to suggest that I consider it to be a viable option at this point. I was trying to merely set the constitutional groundwork, and I think it is pretty well established, that if Congress in theory decided to do it, it could do so.

Mr. **Velde**. In the area of patents and trademarks, this charge of congressional authority and power in that field, administrative tribunals have been established to hear claims and resolve disputes. Does the Supreme Court decision in *Northern Pipeline* suggest that perhaps Congress should anticipate challenges to the current structure of litigation of patent and trademark claims and a whole list of article I functions which are handled administratively or by article I courts, such as the Tax Court?

Mr. **Redish**. Well, first, as to the inquiry about the patents and trademarks, I am certainly not an expert on the structure of how patents and trademarks are decided. But I am aware that the final decision rests with the Federal courts. They have exclusive jurisdiction under section 1338(a) of volume 28 of the United States Code, and the Federal courts have been known to invalidate the decisions of the patent process all too often.

So, I do not think there is a constitutional problem there. The ultimate decision still rests with the Federal article III courts. The Tax Court, on the other hand, is purely an article I court. To my knowledge, its constitutionality has never been determined, certainly not by the Supreme Court. It is conceivable after *Northern Pipeline* that questions might be raised. If it is determined that the rights involved there are what Justice Brennan calls public rights, a concept I have a great deal of trouble understanding in the first instance, and even more difficult understanding its relevance to the issue of article III, but if that is his determination, then the top court could be an article I court.

In other words, if the rights being adjudicated in the Tax Court are public rights, then, according to Brennan's decision, that would be constitutional. If they are determined to be private rights, however, then I would think the Tax Court would be unconstitutional.

Mr. **Velde**. Thank you, Mr. Chairman.

Senator **Heflin**. Thank you.

We appreciate your testimony, and if you have any comments you want to make or, if afterthoughts come about, please write us. We need all of the light that we can focus on this very dark and murky issue.

The record will remain open until next Friday for any comments.

[Whereupon, at 3:45 p.m., the committee adjourned, subject to the call of the Chair.]

[Statements for the record follow:]

TESTIMONY OF PROFESSOR MARTIN H. REDISH,
NORTHWESTERN UNIVERSITY SCHOOL OF LAW,

Before the Judiciary Committee
Of the United States Senate July 23, 1982

On June 28, 1982, the Supreme Court decided the case of Northern Pipeline Construction Company v. Marathon Pipeline Company, 50 U.S.L.W. 4892 (1982), holding that, as presently structured, the Bankruptcy Courts created by the Bankruptcy Reform Act of 1978 could not constitutionally exercise all of the jurisdiction vested in them by that Act, because the judges of these courts lack the salary and tenure protections given article III judges.

The decision creates a serious and immediate problem for Congress, because the Court delayed the effect of its decision until October 4 of this year, in order, in the words of Justice Brennan, speaking for the Court, to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication . . . ." 50 U.S.L.W. at 4902. Of most immediate concern to Congress, then, is how it can revise the method for adjudication of bankruptcies in a fair and efficient manner while at the same time complying with the constitutional constraints set out in Northern Pipeline.

My testimony is divided into three sections. First, I will explore exacty what the decision held, and why. As will be seen, this is far from a simple task, both because of the fact that four separate opinions were written and because the opinion of Justice Brennan announcing the decision of the Court is ambiguous in its actual holding, as well as in its reasoning. The second portion of my testimony will critique the theoretical rationale of Justice Brennan's opinion, and consider some of its serious implications for the allocation of federal judicial power in general. Because I assume that Congress at the present time cannot explore all of the theoretical nuances of Supreme Court doctrine in the manner in which an academic is prone to do, I will keep this discussion brief. It is essential, however, that the fundamentals of the theoretical difficulties inherent in the Court's opinion be grasped, in order to understand the reasons for the severe difficulties facing Congress in attempting to take corrective action on the bankruptcy courts. Finally, my testimony will examine the conceivable options that I believe may be available to Congress, considering the various advantages and disadvantages of each, as well as the chances that each would ultimately be upheld by the Supreme Court. In the course of this analysis, I will also discuss what might happen if Congress fails to take any action by October 4.

I. The Decision

As previously noted, four separate opinions were written in Northern Pipeline, and this fact may be of great significance in deciding what Congress can and cannot do at this point. Most importantly, Justice Brennan's decision announcing the judgment of the Court was not a majority opinion; it represented the views of only four Justices. Three Justices dissented, expressing the view that even as constituted under the 1978 Act, the bankruptcy courts were constitutional. Justice Rehnquist, in an opinion joined by Justice O'Conner, concurred separately, on grounds arguably narrower than that of the plurality. Thus, a combination of the three Justices in dissent and the two in concurrence made up a majority of the Court, and this fact may broaden Congress' options beyond what they would have been had Justice Brennan spoken for a majority of the Court.

It is important to note that the case itself did not involve an exercise of the bankruptcy courts' jurisdiction to discharge a bankrupt and to divide his assets among his creditors. Rather, the facts of the case concerned the exercise of the jurisdiction given to the bankruptcy courts.

to adjudicate traditional, state-created common law claims having nothing to do with the bankruptcy except that one of the parties to the dispute was the bankrupt. The 1978 Act combined the different forms of jurisdiction and vested them in the new "non-article III" bankruptcy courts.* The suit in Northern Pipeline was a claim by Northern, the bankrupt, against Marathon, seeking damages for a variety of state common law claims, including breach of contract and misrepresentation. Marathon sought dismissal on the ground that the 1978 Act unconstitutionally conferred the article III judicial power upon judges who lacked the protections given to article III judges.

A. The Constitutional Background

Article III, section 1 of the Constitution provides that "[t]he judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish" and that "the judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be reduced during their continuance in office." Section 2 of the same article lists all of the categories of cases to which the "judicial power" extends.

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*In the 1978 Act, Congress made clear that it did not intend that the judges of the new bankruptcy courts would be article III judges, since the Act provided for limited terms and no guarantee of compensation. Usually, such judges are referred to as "article I" judges, because they are created pursuant to one of Congress' enumerated powers under article I of the Constitution. In the arguments in Northern Pipeline, an issue was raised as to whether their judges were in fact "article I" judges, since Congress chose to make them "adjuncts" to the article III district courts. I see the argument as mainly a semantic one, at least for constitutional purposes, since whatever they are called, the judges were not article III judges, and it seems that that is the only relevant constitutional consideration. To avoid any confusion, therefore, I refer to these judges simply as "non-article III" judges.

It is clear from the history and language of Article III that Congress need not have created inferior federal courts, and instead could have relied upon the state courts for at least initial adjudication of federal law. It has consistently been assumed that because Congress need not have created inferior article III courts, it may abolish them, and it can, therefore, take the lesser step of curbing their jurisdiction. Sec Generally, Redish & Woods, Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis, 124 U. Pa. L. Rev. 45 (1975). However, a reading of article III would seem to indicate that if and when Congress does create inferior courts to exercise the "judicial power" (as defined in article III, section 2), the judges of those courts must have the protections of salary and tenure. The reasons for these protections are discussed by Hamilton in No. 78 of the Federalist Papers and have been eloquently reiterated by the Supreme Court. As was stated in United States v. Will, 449 U.S. 200, 217-18 (1980), and quoted by Justice Brennan in Northern Pipeline, "A Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." These independence protections are designed to assure that the integrity of the federal judiciary will not be undermined by express or implicit threats of retaliation by the other branches of government who might be displeased with one or another of the courts' decisions. Moreover, since the other two branches are majoritarian in nature, the formal protections of judicial independence help insure that the judiciary will stand as the ultimate protector of minority rights under the Constitution.

Nevertheless, since early in the nation's history the Supreme Court has recognized that Congress may on occasion create courts, as a means of exercising one of its enumerated powers, whose judges do not retain the article III protection of salary and tenure. The earliest and perhaps most memorable decision in this line was the opinion of Chief Justice Marshall in American Insurance Company v. Canter, 26 U.S. (1 Pet.) 511 (1828), holding that the courts of the territories were not article III courts.* Since that time, it has never been entirely clear under what circumstances Congress could employ non-article III courts to adjudicate cases falling within one of the categories of the "judicial power".** This was, in effect, the issue presented in Northern Pipeline; the question before the Supreme Court was whether Congress could employ a non-article III judicial body to adjudicate the legal issues surrounding a bankruptcy proceeding.

B. Justice Brennan's Opinion

Justice Brennan's opinion begins as if it is deciding much more than whether the bankruptcy courts can adjudicate state common law claims involving the bankrupt. His opening statement is: "The question presented is whether the assignment by Congress to bankruptcy judges of the jurisdiction granted in §241(a) of the Bankruptcy Act of 1978 . . . violates Art. III of the Constitution." 50. U.S.L.W. at 4893. That provision of the Act refers to all of the bankruptcy courts' jurisdiction, not merely its jurisdiction over common law claims involving the bankrupt. If Justice Brennan's ultimate conclusion were as broad as the initial question, Congress' options might not include the retention of the present system of bankruptcy courts with merely the excision of their jurisdiction over common law claims involving the bankrupt. But Justice Brennan's reasoning tends to indicate that his final decision was not nearly as broad as his initial inquiry.

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* I have considered the history of "non-article III" or "legislative" courts in greater detail in M. Redish, Federal Jurisdiction: Tensions in the Allocation of Judical Power 35-51 (1980).

** As already noted, it has been accepted that Congress could vest most or all of the "judicial power" in state courts, but in an important sense these courts are as independent of Congress as are the article III courts, since Congress has no authority to regulate the salary and tenure of state judges.

Justice Brennan initially attempts to distinguish the situations in which the use of non-article III courts had been previously approved: territorial courts, military courts martial, and the local courts of the District of Columbia. Each, said Brennan, "involves a constitutional grant of power that has been historically understood as giving the political branches of Government extraordinary control over the precise subject matter at issue." 50 U.S.L.W. at 4896. More importantly, he purports to distinguish cases upholding the use "of legislative courts and administrative agencies created by Congress to adjudicate cases involving 'public rights.'" 50 U.S.L.W. at 4897 (footnote omitted). "Public rights" were defined in the famed decision of Crowell v. Benson, 285 U.S. 22, 50 (1932), to include matters arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments", quoted in 50 U.S.L.W. at 4897. The adjudication of such rights, said Justice Brennan, were not "inherently judicial" and hence while they could be adjudicated by an article III court if Congress so desired, they need not be. Rights which are "inherently judicial" seem to be those involving "[p]rivate-rights disputes", i.e., disputes between private litigants, which, according to Justice Brennan, "lie at the core of the historically recognized judicial power." 50 U.S.L.W. at 4897. It was this latter category of cases, he stated, that could not constitutionally be removed from the article III courts. Those cases that arise "between the government and others", on the other hand, involve public rights and may be given for adjudication to non-article III bodies.

Justice Brennan's emphasis on the public right-private right distinction tends to demonstrate that his ultimate conclusion is not nearly as broad as his initial question. For in response to the argument "that a discharge in bankruptcy is indeed a 'public right'", Brennan stated:

> But the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be a "public right", but the latter obviously is not.
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> 50 U.S.L.W. at 4898.

The importance of this statement is grounded as much in what Justice Brennan did not say as in what he did say. He did not respond to the appellants' assertion by stating that the entire jurisdiction given to the bankruptcy courts was unconstitutional. Rather, he recognized a possible dichotomy, in terms of the public-private distinction, for purposes of the bankruptcy jurisdiction.

In light of this fact, it is arguable that Justice Brennan's opinion invalidated only the vesting of the equivalent of the old "plenary" jurisdiction in the bankruptcy courts, because it was only such jurisdiction that involved the adjudication of "private" rights. Indeed, in footnote 40 of his opinion, Justice Brennan states that "[i]t is clear that, at the least, the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide the state-law contract claim against Marathon." But the difficulty in confidently asserting that Justice Brennan would allow Congress to employ the bankruptcy courts for other purposes is that he never states this explicitly. Moreover, a persuasive argument might be fashioned that the adjudication of the rights of creditors against the bankrupt involve "private" rights of one private litigant against another.

A further complication is created by the distinction which Justice Brennan draws between the constitutional operation of federal magistrates and administrative agencies on the one hand, and the constitutional functioning of the bankruptcy courts on the other. Although the former could properly be characterized as "adjuncts" to the article III federal courts, he stated, the latter cannot be so descirbed. "The functions of the adjunct", said Brennan, must be limited in such a way that "the essential attributes of judicial power are retained in the Art. III court." 50 U.S.L.W. at 4900. Under the Magistrates Act, the ultimate decision is still made by the district court; the bankruptcy courts, in contrast, make their own final decisions, albeit subject to appellate review in the article III courts. Moreover, Brennan rejected the argument "that Congress possesses the same degree of discretion in assigning traditionally judicial power to adjuncts engaged in the adjudication of rights not created by Congress", and noted that "[m]any of the rights subject to adjudication by the Act's bankruptcy courts . . . are not of Congress' creation," once again emphasizing that the instant case involved suit on a state-created common law claim. 50 U.S.L.W. at 4901.

C. Justice Rehnquist's Concurrence

Justice Rehnquist, joined by Justice O'connor, concurred in the judgment, but emphasized that there was no need to decide whether the bankruptcy courts could adjudicate the rights of creditors in the bankruptcy proceeding. In Rehnquist's words:

> [T]he lawsuit in which Marathon was named defendant seeks damages for breach of contract, misrepresentation, and other counts which are the stuff of the traditional actions at common law tried by the courts at Westminster in 1789.
>
> * * *
>
> None of the cases has gone so far as to sanction the type of adjudication to which Marathon will be subjected against its will under the provisions of the 1978 Act. To whatever extent different powers granted under the Act might be sustained under the "public rights" doctring . . . . I am satisfied that the adjudication of Northern's lawsuit cannot be so sustained.
>
> 50 U.S.L.W. at 4903.

D. The Dissents

Separate dissenting opinions were filed by Chief Justice Burger and Justice White, whose opinion was also joined by the Chief Justice and Justice Powell. For present purposes, the reasoning of these opinions is not relevant. All that need be noted is that these three members of the Court were willing to sustain the 1978 Act as written.

II. A Critique of the Decision

There are a number of troubling aspects of Justice Brennan's decision, but perhaps the most problematical is his reliance on the public-private right distinction to justify upholding the work of administrative agencies while striking down the common-law aspect of the bankruptcy court jurisdiction. Adjudication of so-called "public" rights falls more clearly within the terms of the "judicial power", as described in article III, section 2, than does adjudication of the "private" rights which Justice Brennan finds must be heard only by article III courts. The former, of course, are cases "arising under" the laws of the United States, the very first category of cases to which the judicial power is extended, and generally accepted today as the most important cases heard by the article III federal courts because of the need for their expertise and sensitivity to federal interests. See Mishkin, The Federal "Question" in the District Courts, 53 Colm. L. Rev. 157, 158 (1953); American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 164-68 (1969). Indeed, the ultimate irony of the decision in Northern Pipeline is that both the plurality and concurring opinions reach the conclusion that the one type of case which must be heard by an article III court is a suit between private litigants over a state-created cause of action, a case that arguably does not even fall within the terms of article III, except when diversity of citizenship is present. It is true that the Supreme Court has upheld the extension of article III jurisdiction to such suits in the context of a bankruptcy adjudication. Williams v. Austrian, 331 U.S. 642 (1947); Schumacher v. Bealer, 293 U.S. 367 (1934). But at no time has the Court provided the slightest bit of reasoning to justify such an extension, and the intricate "protective jurisdiction" rationales suggested by Professors Mishkin and Wechsler are, at best, controversial. See M. Redish, supra at 59-63. But even if these cases do fall within article III, it is absurd to suggest that such suits somehow represent the "core" of the federal judicial power. On linguistic, historical and policy grounds, they are at most peripheral to the constitutional scope of substantive federal judicial authority. As already noted, such cases are nowhere mentioned specifically in the text of article III, section 2 and can only be justified as a remote appendage to the "arising under" jurisdiction. Historically, there is absolutely no evidence that the Framers deemed such cases as a central part of the judicial power. The only source of such a view are the self-serving and conspicuously unsupported statements of Justice Brennan to that effect. Finally, to consider such "private" rights to be the one major area which must be adjudicated by article III courts stands the policies behind the salary and tenure provisions on their heads. For if, as Justice Brennan himself states in detail at the outset of his opinion, the primary purpose of those protections is to avoid the "tyranny" of the majoritarian branches and their possible intimidation of the judicial branch, the type of case which least presents these dangers are adjudications between private litigants of state-created common law causes of action. In contrast, the cases that are most likely to cause such difficulties are those to which the government is a litigant—the very "public" right cases which Justices Brennan and Rehnquist suggest might not have to be adjudicated in an article III court.

The apparent rationale for drawing the dichotomy is two-fold. Initially, it is argued that adjudication of common-law rights represented the work of the courts at the time of the Constitution's drafting, and it is therefore reasonable to conclude that by the term, "judicial power", the Framers intended to incorporate by reference the work of the courts at that time. Such an argument might have some force if the Framers had stated simply that the "judicial power" was vested in the federal judiciary, without further defining the phrase. But of course, the Framers told us, in about as clear a manner as they told us anything, exactly what types of cases to which the "judicial power" extended, and as previously noted, virtually none of them concerns adjudication of state-created common law causes of action.

The second asserted justification for the dichotomy was put forth by Justice Brennan: "The doctrine may be explained in part by reference to the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued . . . . [T]he Framers expected that Congress would be free to commit such matters completely to non-judicial executive determination, and that as a result there can be no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court or an administrative agency." 50 U.S.L.W. at 4897. But this argument is no more persuasive. First, the "greater-includes-the-lesser" argument simply does not work: Congress may not be obligated to enact a statutory benefit, but if it does so it cannot provide that no blacks will receive that benefit, or that the benefit can be received only on the condition that the recipient waive his constitutional right of free speech. In such a situation, the greater does not include the lesser; even though Congress may not be obligated to act, once it chooses to do so, it is constrained by the limits of the Constitution. This principle is logically no different when that constraint is imposed by article III than when it derives from the first amendment.

Moreover, the argument that since Congress could "commit such matters completely to non-judicial executive determination" Congress may instead employ non-article III bodies, also fails. First, with the possible exception of "private bills" to compensate individuals injured by government action, it is highly doubtful that Congress itself could assume the task of adjudicating individual claims under a particular statute. Such action would likely be deemed a violation of the separation of powers as the performance of a judicial function, and in any event would be a practical impossibility. Second, to suggest that these matters could be committed to executive determination begs the question, for the very issue in dispute is whether such matters have to be adjudicated by an article III court.

Thus, despite its venerable origins in Supreme Court precedent [see e.g., Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272 (1855); Crowell v. Benson, 285 U.S. 22 (1932); Atlas Roofing Co. v. Occupational Safety Council, 430 U.S. 442 (1977)], the "public-private" right distinction is a totally unsupportable basis on which to separate the proper scope of authority of article III courts from that of article I bodies.

It is beyond the scope of this testimony to suggest an alternative limiting principle to provide guidance in determining when legislative courts may adjudicate article III matters. To a certain extent, I have already done so in previous writing. See M. Redish, supra at 45-47. For present purposes, however, it is appropriate to note merely that the dichotomy suggested by a majority of the Justices as a means of determining the proper activity of non-article III courts, and which may ultimately guide Congress' resolution of its current dilemma over bankruptcy adjudication, runs counter to both the language and policies of article III.

III. Congress' Present Options

Whatever its merits, Northern Pipeline represents a constitutional holding of the Supreme Court, and Congress must now deal with it. In my view, Congress presently has available five conceivable options, all of which contain potential practical drawbacks and all but one of which continue to be plagued by constitutional doubts. These options are as follows:

1. Declare all of the judges of the bankruptcy courts to be article III judges, with all of the constitutional protections required by that article.
2. Retain the current structure of bankruptcy courts as non-article III bodies, but remove from those courts jurisdiction to adjudicate all state common law claims involving the bankrupt and instead vest jurisdiction to adjudicate those claims in the federal district courts.
3. Provide article III status to a segment of the bankruptcy judges, and have those judges adjudicate the common law suits against the bankrupt, while the non-article III bankruptcy judges continue to distribute the bankrupt's assets.
4. Retain the combination of summary and plenary jurisdiction, but abandon the present structure of bankruptcy courts in favor of a system comparable to the pre-1978 "judge-referee" system.
5. Abandon entirely the 1978 Act's adjudication structure in favor of a completely administrative system, with final enforcement of the administrative agency's order in an article III court.

I will proceed to consider the relative advantages, disadvantages, and constitutional problems of each of these options.

A. Giving All Bankruptcy Court Judges Article III Status

In a constitutional sense, at least, the first option is by far the easiest. There can be no doubt that the subject matter of the bankruptcy courts' jurisdiction falls within the limits of the federal judicial power, and the Court in the past has shown itself receptive to apparent changes in congressional intent concerning the article III status of federal judicial bodies. In Glidden v. Zdanok, 307 U.S. 530 (1963), for example, the Court, in holding that the Court of Claims and Court of Customs and Patent Appeals were article III courts despite earlier decisions holding them to have article I status, emphasized the relevance of more recent congressional declarations that both courts were to be deemed article III bodies.

Of course, the imposition of article III status on all bankruptcy judges may impose burdens on Congress that make the alternative unattractive, because the judges will then receive the constitutional protection of life tenure and unreducable salary, and the judges will presumably require Senate confirmation. But if one of the goals of the 1978 Act was to increase the prestige of these judges [see Eisen & Smrtnik, The Bankruptcy Reform Act of 1978—An Elevated Judiciary, 28 DePaul L. Rev. 1007 (1979)], surely there is no better way to accomplish this goal than to provide article III status. Moreover, as will be seen in subsequent discussions, each of the remaining alternatives also involves one or more practical drawbacks, and—of equal importance—each of those alternatives is likely to result in future litigation, leaving the method of bankruptcy adjudication in a state of constitutional flux for years to come. The greatest advantage of the article III-status alternative, then, is that it will put an end to the constant uncertainty over the constitutionality of Congress' chosen method of bankruptcy adjudication.

B. Dividing Bankruptcy Adjudication Between the Bankruptcy Courts and the District Courts

The second alternative open to Congress is to retain the article I status of the bankruptcy courts, but vest their former jurisdiction over common law suits in the federal district courts. The obvious advantage of this alternative is that it permits Congress to avoid the burdens of imposing article III status on the bankruptcy courts, while simultaneously complying with the thrust of Northern Pipeline. For whatever its ambiguities, all that Northern Pipeline actually decided was that the non-article III bankruptcy courts could not adjudicate common law claims involving the bankrupt.*

The disadvantages of this alternative, however, are significant. Initially, it defeats one of the important goals of the 1978 Act, combining all of the forms of jurisdiction in one judicial body. By keeping these jurisdictions separate, there is a real danger of delay and wasted time and expense. Moreover, this alternative will result in added burdens on the already crowded district courts, a result Congress was presumably attempting to avoid by passage of the 1978 Act. Fianlly, although use of this alternative will avoid the actual holding in Northern Pipeline, it will not avoid future constitutional challenges. For neither the opinion of Justice Brennan nor that of Justice Rehnquist conclusively indicated whether non-article III courts could adjudicate any of the traditional bankruptcy jurisdiction. Justice Rehnquist expressly left the issue open, because the instant case presented only the issue concerning the courts' jurisdiction over traditional common law suits. 50 U.S.L.W. at 4903. Justice Brennan, in responding to the argument that bankruptcy jurisdiction concerned public rights, stated that restructuring debtor-creditor relations "may well be a 'public right'", but the adjudication of common law rights clearly was not. 50 U.S.L.W. at 4898. Whether this indicates that Congress could vest the fundamental bankruptcy jurisdiction in a non-article III court is open to conjecture. The dissent of Chief Justice Burger emphasized that "the Court's holding is limited to the proposition. . . that a 'traditional' state common-law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law, must, absent the consent of the litigants, be heard by an 'Article III Court' if it is to be heard by any court or agency of the United States", and that "[T]he problems arising from today's judgment can be resolved simply by providing that ancillary common-law actions, such as the one involved in this case, be routed to the United States district court . . . ." 50 U.S.L.W. at 4903. But the Court never actually holds that this would be a constitutional course; the most that can be said is that the Court did not hold that this course would be unconstitutional. And, as noted previously, it is arguable that adjustment of debtor-creditor relations does not involve public rights, because the contest is solely among private litigants.

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* As noted in my discussion of the case's holding, Justice Brennan purported to be deciding more than this, but ultimately his opinion seemed to go no further. In any event, the two concurring Justices clearly went no further and, when combined with the three dissenters who would have found the bankruptcy courts valid as presently structured, make up a five-person majority.

C. Dividing the Bankruptcy Courts Into Separate Article I and Article III Courts

A third alternative is, for constitutional purposes, similar to the second, but presents different practical problems. This alternative is to provide article III status to a certain percentage of the bankruptcy judges, and have those judges adjudicate the common law claims. As with the second alternative, this would avoid the problem created by the actual holding in Northern Pipeline. Its comparative practical advantage is that it would not burden the district courts, but its comparative disadvantage is that it would dictate an increase in the number of article III judges, though not as many as if the first alternative were adopted.

D. Return to a Referee System

The fourth alternative is to abandon the judicial structure adopted in the 1978 Act in favor of a system in which the bankruptcy adjudicator—whether called "judge" or "referee"—is brought more closely under the control of the federal district court, which would have the ultimate authority to adjudicate bankruptcies. The advantage of this alternative is that it might well allow

Congress to retain the benefits of a combination of all of the bankruptcy jurisdictions, though the system would no doubt be subjected to constitutional attack.

The reason that such a system might pass constitutional muster is that Justice Brennan, in rejecting the argument that the bankruptcy courts were merely "adjuncts" of the district courts, compared the bankruptcy court operation unfavorably to the magistrate system. Brennan noted "that the magistrate's proposed findings and recommendations were subject to de novo review by the district court, which was free to rehear the evidence or to call for additional evidence", 50 U.S.L.W. at 4900, and that "the ultimate decisionmaking authority respecting all pretrial motions clearly remained with the district court." Id. Thus, if Congress were to return to a system in which the specialized bankruptcy adjudicator was largely under the direct control of the article III district court, the Court might conclude that the system is sufficiently analogous to the magistrate system to meet constitutional standards.

The practical drawback of such an arrangement is that it takes away from the bankruptcy courts the very elevation in stature that the 1978 Act was designed to provide. Moreover, such a procedure still presents serious constitutional questions. For in distinguishing the work of federal administrative agencies from the jurisdiction exercised by the bankruptcy courts, Justice Brennan relied on more than merely the difference in the degree of independence of the two bodies. "[I]t is clear that when Congress creates a substantive federal right," wrote Justice Brennan, "it possesses substantial discretion to prescribe the manner in which that right may be adjudicated—including the assignment to an adjunct of some functions historically performed by judges." 50 U.S.L.W. at 4900. In a footnote, he added: "Contrary to Justice White's suggestion, we do not concede that 'Congress may provide for initial adjudication by Article I courts or administrative judges of all rights and duties arising under otherwise valid federal laws'. . . . This case does not require us to specify further any limitations that may exist with respect to Congress' power to create adjuncts to assist in the adjudication of federal statutory rights." Id. at 4900, n. 32. Moreover, Brennan stated that "Crowell does not support the further proposition . . . that Congress possesses the same degree of discretion in assigning traditionally judicial power to adjuncts engaged in the adjudication of rights not created by Congress." Id. at 4901. Finally, Justice Brennan stated that "Congress' power to create adjuncts and assign them limited adjudicatory functions is in no sense an 'exception' to Art. III. Rather, such an assignment is consistent with Art. III, so long as the 'essential attributes of judicial power' are retained in the Art. III Court . . . and so long as Congress' adjustment of the traditional manner of adjudication can be sufficiently linked to its legislative power to define substantive rights . . . ." Id. at 4899, n. 29 (emphasis added). Thus, Justice Brennan seems to be implying that the mere fact that non-article III bodies are under the effective control of an article III court will not be constitutionally sufficient; additionally, the substantive right being adjudicated must itself be the creation of Congress. If this is a proper interpretation of Brennan's opinion, Congress could still not have the bankruptcy "referee-judges" rule upon state common law claims, even though they were brought under the substantial control of the district court.

Several factors militate against this construction of Brennan's opinion, however. First, Justice Brennan had already stated that when Congress creates a "public" right, it can have those rights interpreted and enforced by a non-article III court, even one fully independent of the article III courts. Given this, he logically would not have had to discuss the requisite degree of article III judicial control, if he had intended to limit the constitutional use of such adjuncts to the adjudication of rights created by Congress; he had already concluded that such rights could be totally removed from article III court adjudication. Second, magistrates may be utilized by the district courts in diversity cases, as well as those involving federal questions,* yet Congress has, of course, not created the substantive rights adjudicated in diversity cases. Thus, in light of the obscure nature of Brennan's opinion, it is simply unclear whether congressional adoption of a referee scheme, with a consolidation of the summary and plenary jurisdictions, would be constitutional.

E. Adoption of a Complete Administrative Scheme

Instead of adopting the referee-judge scheme, Congress could conceivably replace the entire judicial bankruptcy scheme with a purely administrative system, under which the administrative agency must seek approval and enforcement of its orders in the district court. The comparative practical advantages and disadvantages of such a system are well beyond whatever degree of expertise I possess, but given the ambiguity of Justice Brennan's opinion on the issue, it appears that the constitutional doubts about this procedure are no different from those raised about the preceding alternative.

IV. What Will Happen
If Congress Fails to Act by October 4

The opinion of Justice Brennan gives little hint as to what would happen to the method of bankruptcy adjudication if Congress fails to take any corrective action by October 4. In footnote 40 of his opinion, Justice Brennan concludes that the two forms of the bankruptcy courts' jurisdiction are not easily severable: "[W]e cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankruptcy court over these matters, leaving the jurisdictional provision and adjudicatory structure intact with respect to other types of claims, and thus subject to Article III constitutional challenge on a claim-by-claim basis." Nor was he willing to assume, as the dissenting Chief Justice had, that Congress would choose to route cases of this sort to the district court.

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* See Small v. Olympic Prefabricators, Inc., 588 F. 2d 287 (9th Cir. 1978).

If Congress does fial to act by the Court's deadline, we must assume that the judiciary would not leave a vacuum in place of the bankruptcy courts. The courts might then decide to take the simplest course, which would be the Chief Justice's suggestion. But this would be difficult for the lower courts to do, in light of Justice Brennan's footnote, and it would fall upon the Supreme Court to revise its assessment, possibly after a lengthy delay. Another possibility is that the courts would simply revert back to the pre-1978 Act procedure, though it is unclear whether the substantive changes enacted in 1978 could be effected under such an adjudicatory structure. If this were a problem, it is even conceivable that the courts would have to disregard the entire 1978 Act, not just its adjudicatory provisions.

In short, there is no clear answer as to what would happen if Congress fails to take corrective action by October 4. For this reason, it is most advisable for Congress not to let the October 4 deadline pass without making a formal legislative response to Northern Pipeline.

V. Conclusion

Ultimately, Congress does seem to have several viable options, though none of them may solve the practical difficulties as well as did the system devised in the 1978 Act. The first option considered—providing article III status to all of the bankruptcy courts—is in many ways the most advisable, since it would enable Congress to keep the two forms of bankruptcy jurisdiction combined in one forum, to maintain the elevated status of the bankruptcy courts, and to avoid adding undue burdens on the district court. However, if Congress concludes that the burdens and expense that result from use of this option are too great, perhaps the alternative suggested by the Chief Justice—shifting the suits involving the bankrupt dealing with common law rights into the district courts—may prove to be the least troublesome resolution.

STATEMENT OF
RICHARD LEVIN*
Before the
Committee on the Judiciary
United States Senate
July 23, 1982
Concerning the Bankruptcy Courts

THE NEED FOR CONGRESSIONAL ACTION

The Supreme Court invalidated section 241 of the 1978 bankruptcy law in Northern Pipeline Construction Co. v. Marathon Pipe Line Co. on June 28, 1982, as an unconstitutional vesting of jurisdiction in a non-Article III court, but stayed the effect of its decision until October 4, 1982, the beginning of its next Term. The Marathon case itself involved only jurisdiction over a State contract law cause of action. However, the Supreme Court found the jurisdiction that Congress vested in the bankruptcy courts in 1978 non-severable and thus struck down all of the jurisdiction, even though the Court might have permitted exercise by a non-tenured bankruptcy court of other bankruptcy-related decision-making functions.

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The Supreme Court did not make clear what it intended when it struck down section 241 in its entirety after October 4. It may be that the bankruptcy courts may exercise none of the jurisdiction conferred by that section. It may be that the Supreme Court would relent and find exercise of a portion of the jurisdiction permissible until Congress fashions a remedy, although that seems unlikely. It may be that section 1334 of the Judicial Code (title 28 of the U. S. Code), which previously vested jurisdiction over bankruptcy matters in the district court, but which the 1978 law did not repeal until April 1, 1984, will take over, so that the district courts will have all bankruptcy judisdiction, without any referees, magistrates, or bankruptcy judges to assist them. It is not clear what will happen to pending bankruptcy cases and law suits pending in those bankruptcy cases. Bankruptcy practitioners are unsure how to commence new bankruptcy cases and whether the bankrutpcy laws' protections apply if a case is commenced in a wrong or an unconstitutional court.

What is clear is that the Congress must act to avert the uncertainty that would paralyze the bankruptcy system on October 4. In this era of unprecedented business and consumer failures, continued high interest rates, unemployment hovering near 10%, and lengthy recession, the bankruptcy laws and the bankruptcy system provide an essential economic cushion. For individuals, bankruptcy provides relief from the extraordinary burdens of debt that often lead to illness, family separation and inability to keep a job. For businesses, the reorganization provisions of the bankruptcy law permit continued operations, continued jobs for employees, and the prospect of recouping loans and investments. Major companies such as Wickes/Gamble-Skogmo, Addressograph-Multigraph, Itel, White Motor Co., Saxon Industries, Coleman-American, and Penn-Dixie are using the business reorganization provisions of the Bankruptcy Code today. If the system ceases to function, those businesses and thousands of others may be forced to close; thousands would lose their jobs. The bankruptcy system is essential in today's complex economy to soften the blow of economic hard times. Congress must preserve it by fashioning a legislative response to Marathon.

Marathon raises two primary issues for Congress to address. They are inter-related. One is the form of court that Congress should re-establish to exercise bankurptcy jurisdiction; the other is the jurisdiction that should be vested in that court. This Committee need not start from scratch in addressing these issues. Congress and the congressionally-created Commission on the Bankruptcy Laws of the United States have been studying means of improving the bankruptcy system for over a decade. Intensive hearings were held in both the Senate and the House Judiciary Committees in the 94th and 95th Congresses. A very complete record was made. There can be little said now that was not already covered in the many years of prior study and decision.* The Committee should not attempt to cover that ground again or to reconsider the decisions made in 1978, except as necessary to address the impact of the Marathon decision and the effect of the 1978 changes on the two issues that now confront this Committee -- the jurisdiction and structure of the bankrutpcy courts.

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* I attach as appendices copies of the relevant portions of the Senate and House Judiciary Committee Reports from the 95th Congress for this Committee's easy reference.

JURISDICTION

Inseparability was the key to the Supreme Court's decision in Marathon. Inseparability was the key to Congress' decision in 1978 in establishing the bankruptcy courts' broad jurisdiction under section 241. Inseparability should be the key to Congress' decision in formulating its response to Marathon. The Supreme Court was probably right in not predicting that Congress in 1978 would simply have lopped off a portion of the bankruptcy court's jurisdiction had Congress then known of the Marathon decision. The Court was right because Congress did indeed intend, as one of its major legislative goals, non-severable bankruptcy court jurisdiction. Divided bankruptcy court jurisdiction is wasteful, inefficient, debilitating, unfair, and unnecessary.

Divided bankruptcy court jurisdiction is wasteful because it requires frequent and difficult litigation over whether the bankruptcy court has jurisdiction over a particular controversy. It is inefficient because in hearing the litigation over jurisdiction, the bankruptcy court must often hear the merits of a case. If the court does not have jurisdiction, the merits must be retried in another court. It is debilitating to the bankruptcy process because the litigation over jurisdiction and the need to resort to other courts for ultimate decisions on the merits of many issues delay the progress of a bankruptcy case, require creditors to wait longer to receive distribution, and increase the risk of deterioration in the value of assets and the risk of failure of a reorganization case. If the surgery takes too long, the patient may die on the table. It is unfair, because it permits jurisdiction by ambush. In any divided jurisdiction system, consent by the litigants or waiver of objection can remove impediments to the exercise by the bankruptcy court of jurisdiction over a particular matter. The law on consent or waiver under the former Bankruptcy Act had developed to the point where waivers of objections to jurisdiction were often made unknowingly at an early stage of a bankruptcy case before a potential defendant had any reason to fear that he might be dragged into the bankruptcy court for an affirmative recovery by the trustee or debtor in possession.

Divided jurisdiction is unnecessary because Congress may vest all bankruptcy jurisdiction in one federal court. Vesting it in two federal courts defeats most of the purpose of unifying bankruptcy jurisdiction. Remitting the parties to State court is equally damaging. It is contrary to the interests of creditors in all cases and of debtors in reorganization cases, and contrary to the federal interest in a successful bankruptcy system. There is a danger of hostile interpretation of federal bankruptcy law by state court judges; more important, delay can be fatal to the interest of those with jobs, loans, and investments at stake. A fundamental part of the bankruptcy system is a mechanism for resolving disputes quickly, fairly, and accurately. While justice delayed in any proceeding is justice denied, justice delayed in the bankruptcy process is often the destruction of the process itself.

There is a strong federal interest in unified jurisdiction in the bankruptcy courts. Nearly every organization or individual that testified in the hearings in the 94th and 95th Congresses urged Congress to eliminate the former divided jurisdiction of the bankruptcy court. Unified jurisdiction is one issue on which both the Senate and the House were in complete agreement in 1978. The decision now should be to leave jurisdiction unified.

Experience bears out the wisdom of the decision. The expanded jurisdiction of the bankruptcy court has worked well, has reduced waste, and has resulted in more efficient handling of bankruptcy cases. Such litigation as there is over jurisdiction is at the outer reaches of the issues that are central to the administration of a bankruptcy case. In the main, they are infrequent and do not delay the handling of bankruptcy liquidation and reorganization cases.

COURT STRUCTURE

The Senate and the House, as well as most of those involved with the bankruptcy process, also all agreed that the bankruptcy court should be upgraded from its previous stepchild relationship with the district court and given its independence. This Committee's 1978 Report stated, "The need for a functionally independent bankruptcy court has been demonstrated beyond question." S. Rep. No. 95-989, at 15. The lower status of the bankruptcy court had prevented it from attracting the best qualified individuals to serve as bankruptcy judges, and generally diminished respect for the one federal court that directly affects more people than any other. Lawyers did not feel that the court was a "real" court; laymen saw it only as a collection forum in which fair trials were the exception, not the rule.

The 1978 legislation substantially changed the reality and the public perceptions of the bankruptcy courts. The courts are being accorded more respect. Practice before them by the bar is being brought more into the mainstream of federal practice. Congress should not reverse direction on this important issue.

MARATHON PIPE LINE

The Supreme Court's decision in Marathon adds a new dimension to the debate over the jurisdiction and the structure of the bankruptcy court. Before Marathon (and before the enactment of the 1978 law), there was frequent debate over how far the Supreme Court would permit Congress to go in the bankruptcy area in disregarding the explicit, though eroded, mandates of Article III of the Constitution and over how far Congress should permit itself to go.

Marathon gives some guidance. Certainly, the plurality opinion of four justices suggests that the limits are strict, that Congress must place all but administrative functions in an Article III court, or at least that a non-Article III bankruptcy court could do little more than an administrative agency. The concurring justices did not go so far, not because they disagreed with the substantive conclusion of the plurality, on which they expressed no opinion, but because the lawsuit in Marathon did not go so far. The concurring justices limited their decision of invalidity to the state law issue lawsuit without commenting on the remainder of the bankruptcy court's jurisdiction. Nevertheless, we know that some limits would be required on a non-Article III court.

One possible response to Marathon is to reconstitute the bankruptcy courts as Article III courts in order to retain the unified jurisdiction provided under section 241 of the 1978 Act. For all the reasons that Congress considered in creating unified jurisdiction in 1978, Congress should do so and leave that jurisdiction in place.

The alternative to that response is to limit the bankruptcy court's jurisdiction. But Marathon creates a problem that is nearly insoluble in the absence of an Article III bankruptcy court. The problem is a line drawing problem of two dimensions. The first dimension is the problem of determining whether to follow the plurality or the concurring opinions in drawing the line. Mr. Justice White's vigorous dissent may tempt those who, for other reasons, wish to avoid the constraints of Article III and deny its protections to bankruptcy judges, to follow the concurring opinion, argue that only State law issues should be removed from the bankruptcy courts' jurisdiction, and hope that such a line will send the two concurring justices over to the dissent, thus forming a majority in support of the line.

This sort of Supreme Court vote-counting ill becomes Congress and the constitutional expertise of this Committee. It also risks a serious misreading of the concurring opinion. Congress has its own obligation to interpret and uphold the Constitution. Of course, the Supreme Court provides guidance. But it is the Court, not the individual justices of the Court (who may change at any time) that should provide the guidance. The concurring opinion gives no indication of which side its authors would come down on in the event Congress attempted to draw a "State law only" line. Indeed, the questions they asked at oral argument (which is always an uncertain indicator) evidence substantial concern with the creation of a non-Article III court. When presented with a different case, they may well agree with the plurality on the overriding constitutional doctrine. Thus, vote-counting by itself can little aid this Committee in its difficult task.

If this Committee were given to line-drawing to solve the Marathon problem, it should look at the decision of the Court as a whole -- the sum of the plurality and concurring opinions. As a whole, they indicate that the Supreme Court would not permit actions at common law -- that is, suits for the recovery by a bankruptcy estate of money from an adverse third party -- to be tried in the federal system by non-Article III courts. Although the issue in Marathon involved only a state contract law cause of action that became property of the bankruptcy estate under Bankruptcy Code section 541, that kind of lawsuit is indistinguishable from an action under State law to collect an account receivable that becomes property of the estate under section 541, or from any other action to recover an asset of the estate, even one based on federal law. Since one of a trustee's principal responsibilities in a bankruptcy case is to collect and reduce to money the assets of the estate (see Bankruptcy Code §704(1)), removal of this litigation from the bankruptcy courts' jurisdiction would have a severe debilitating effect on the expeditious conduct of bankruptcy cases and would reinstitute all the delays that so discredited the former law.

Other kinds of lawsuits might also fall within the Marathon prohibition. The trustee's avoiding powers under the

Bankruptcy Code permit a trustee (or a debtor in possession) to undo transactions entered into by a debtor shortly before bankruptcy if they are unfair to creditors generally. They include preference and fraudulent transfer recovery actions, and other actions to set aside secret liens on the property of a bankrupt debtor. These actions typically seek a money judgment. Even though the substantive grounds on which some of them rest were unknown to the common law (fraudulent transfer law was created by the statute of 13 Eliz. c.5 (1570)), a suit to collect a money judgment is "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789", as the concurring opinion states, and therefore must be tried in Article III courts if tried in the federal courts.

In any event, even if these actions could be tried to a bankruptcy court that was essentially an administrative agency or subordinate adjunct of the district courts, judgments could not be enforced without judicial intervention. Presumably, the intervention would have to be meaningful and not simply a rubber stamp of the bankruptcy court's decision. See United States v. Raddatz, 447 U.S. 667 (1980). Thus, the delays and the expense of a "master's" written report and an additional trial would be added to the bankruptcy litigation process. That is directly contrary to what Congress had in mind in 1978 in enacting unified jurisdiction and a bankruptcy court with complete powers to carrying its orders and judgments in effect.

Wherever Congress might decide to draw a line, whether to exclude only property of the estate (section 541) actions from the bankruptcy court's jurisdiction, or to exclude all avoiding powers as well, the result is predictable. The line will be litigated and litigated frequently. Lawyers for trustees will try to find ways around the line and into the bankruptcy case. Katchen v. Landy, 323 U.S. 323 (1966), indicates one example of a way around the line. Lawyers for defendants would challenge the bankruptcy court's jurisdiction over each particular case, as they did under former law. Now, however, they would have an added weapon of challenging the constitutionality of the exercise by the bankruptcy court of jurisdiction over any case that the court found fell within the statutory limits of its jurisdiction.

All of the former litigation over jurisdiction would be revived, though perhaps in different form, and increased by the constitutional issue and by the untested contours of the new line. All that was accomplished in 1978 would be eliminated. Collection and distribution of estates would be delayed; reorganizations would languish awaiting jurisdictional decisions by the bankruptcy courts or decisions on the merits in state courts which are over-crowded or in federal courts in which criminal matters have constitutional and statutory priority. Lawyers might benefit from increased litigation fees, but all other participants in the bankruptcy process, including the Federal Treasury which must pay to have enough judges to decide jurisdictional issues, would lose.

These problems do not justify dispensing with the protections of Article III of bankruptcy courts. Congress should avoid the line-drawing problem by creating the courts as the Constitution requires.

APPEALS

If the bankruptcy courts are to be established as Article III trial courts, there seems little reason to perpetuate the system of appeals to other Article III trial courts, the district courts. Admittedly, there are problems with an appeal only to the court of appeals. The need for speed and economy in the bankruptcy arena suggests that the courts of appeal may be too remote or too slow to accommodate the needs of bankruptcy litigants. Thus, Congress enacted an experimental program of bankruptcy appellate panels in 1978, to be implemented at the option of the circuit councils. Only the First and Ninth Circuits have implemented the program to date, but the results have been very encouraging. Appeals are heard by three member panels of judges experienced in the bankruptcy area. Decisions are usually made quickly, and the cost to the litigants is relatively low.

I favor the expansion of the appellate panel system nationwide. I might have favored waiting until the end of the original transition period in 1984 to have more complete information on the workings of the panel system before expanding it. Given the need to respond to Marathon, however, I believe there is adequate information on which to base a decision to expend the panel system and to eliminate the alternative of appeals to the district courts. I would preserve the option of the litigants to bypass the panels and go directly to the court of appeal by agreement. Since the diversion of cases from the courts of appeals in the first instance was for the convenience of the litigants, I would permit them to waive that protection. If both parties intend to pursue the matter to the court of appeals in any event, then an intermediate appeal is a waste of time and money.

The panel system should be modified to make it a true court. Some problems have arisen over the powers of the panels to issue stays and writs and to decide issues, such as motions and frivilous appeals, that permit summary disposition by a panel of fewer than three. Constituting the panel as a court would solve these problems. I do not mean by this that Congress should etablish separate judgeships for the panels. As the Temporary Emergency Court of Appeals was staffed by judges of other courts, the panels could continue to be staffed by judges from the bankruptcy courts (and from the district courts and courts of appeals by designation and assignment under chapter 13 of the Judicial Code) to provide maximum flexibility at minimum cost.

JUDICIAL GOVERNANCE

Participation by the bankruptcy judges in the judicial governance and budgeting process is essential if the bankruptcy court is to maintain its ability to handle its current staggering volume of cases. The administrative problems of bankruptcy courts and the amount of paper processed through their clerks' offices are sui generis. The educational needs of the bankruptcy judges through the Federal Judicial Center are different from those of the generalist judges of the district and circuit courts. The budgeting process requires allocation of scarce resources among the various parts of the judiciary. Bankruptcy judges should have full membership on the Judicial Conference, in the judicial councils of the circuits, and on the Board of the Federal Judicial Center to insure proper functioning of the system.

TRANSITION

Transition from the unconstitutional court system to a new system presents one of the more delicate problems to be solved in response to Marathon. The Supreme Court gave little guidance on what could be done during a transition period, but previous Court decisions and the stay itself in Marathon suggest that there is some flexibility.

First, Congress should establish the new bankruptcy courts effective upon enactment of the corrective legislation. This can be done immediately, without the determination of how many judges will be needed and without the actual appointment of judges. It is made easier by the existence of an administrative structure to support the courts -- the clerks' offices of the various bankruptcy courts and the Bankruptcy Division of the Administrative Office of the United States Courts.

The immediate creation of constitutional courts will provide the constitutional support for the exercise of jurisdiction in bankruptcy cases during a transition period by nontenured judges. The Supreme Court's few comments on the powers of a nontenured transition court system indicate that exercise of jurisdiction is permissible during a transition to a constitutional court system. See Glidden Co. v. Zdanok, 370 U.S. 530 (1962); Metlakatla Indian Comm. v. Egan, 363 U.S. 555 (1960). If Congress establishes the permanent court system now, it solves the transitional problem to a large degree.

The Judicial Conference is scheduled to report to Congress by January 3, 1983, on the number of bankruptcy judges that will be required to staff the court system. Pub. L. 95-598, §406(b). Congress should be able to act quickly when it convenes in January 1983, under the circumstances of this issue, to create the necessary number of judgeships. Moreover, while the congressional process of creating the judgeships is progressing, the President can commence the search for individuals to fill the positions. It is optimistic, but not out of the question, for Congress to set a target date of October 1, 1983, for the appointment of new bankruptcy judges to replace the existing judges. Perhaps not all appointments will be complete. But the new bankruptcy court could undertake its duties on that date.

In the meantime, Congress should authorize existing bankruptcy courts to continue to exercise the jurisdiction granted under section 241 of the 1978 bankruptcy legislation. As a transition measure, this would be permissible. District courts could be authorized to hear de novo any matter that bankruptcy courts could not constitutionally hear and enforce under their own powers during a transition period. While that is not a very efficient system, it would last only a short while, be narrowly limited, and be more efficient than and preferable to requiring bankruptcy litigants to seek redress in state courts or in the federal district courts, unless they choose to do so as an initial matter. Once the new court system is established, cases could be transferred, as provided under section 409 of the 1978 law for transfer to the then-contemplated court system. If all judgeships were not filled by October 1, 1983, the new Article III bankruptcy courts could exercise the de novo review power that the district courts would exercise during transition, at least until all positions were filled and the former bankruptcy judges were retired.

FOLD-IN

One transition issue requires special mention, because there has so often been a deeply ingrained belief about the status of existing bankruptcy judges in a new court. The existing bankruptcy judges were appointed by the district courts. Article II, section 2 of the Constitution permits appointment of inferior Officers of the United States by the courts of law. Former bankruptcy judges, as subordinate arms of the district courts, probably were inferior Officers. Thus, their appointment by the district courts met with constitutional requirements.

Judges of Article III courts may or may not be inferior Officers, as that term is used in Article II, section 2. Certainly, that section does not directly require that "judges of the inferior courts" be appointed by the President by and with the advice and consent of the Senate. Nevertheless, that has always been the method of appointment of judges of the inferior Article III courts, so it is probably well-settled that Article III judges must be appointed by the President with the advice and consent of the Senate.

At the least, Congress may not make appointments. Buckley v. Valeo, 424 U.S. 1 (1976) (Congressional appointment of members of the Federal Election Commission not permitted). A congressional enactment that all sitting bankruptcy judges would become judges of the new courts would probably run afoul of Buckley and the

Appointments Clause, even though the individuals selected for the positions were originally appointed by the district courts, unless Congress were to eschew Article III courts and simply continue the former bankruptcy courts with limited juisdiction. Then, the sensible alternative would be to leave the bankruptcy judges in place and not require Presidential/Senate appointment. However, if Congress establishes new courts, the individuals who will sit on those courts must be selected by the President with the advice and consent of the Senate. Cf. Glidden Co. v. Zdanok, 370 U.S. 530, 589 (1962) (Frankfurter, J. concurring).

95TH CONGRESS } SENATE { REPORT
2d Session } { No. 95-989

BANKRUPTCY REFORM ACT OF 1978

JULY 14 (legislative day, MAY 17), 1978.—Ordered to be printed

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Mr. DECONCINI, from the Committee on the Judiciary,
submitted the following

REPORT

[To accompany S. 2266]

The Committee on the Judiciary, to which was referred the bill, S. 2266, to establish a uniform law on the subject of bankruptcies, having considered the same, reports favorably thereon and recommends that the bill in the nature of a substitute do pass. The committee amendment strikes out all after the enacting clause and inserts a new text, which appears in italic type in the reported bill.

PURPOSE OF THE BILL

The purpose of the bill is to modernize the bankruptcy law by codifying a new title 11 that will embody the substantive law of bankruptcy and to make extensive amendments to title 28, Judiciary and Judicial Procedure, that will encompass the structure of the revised bankruptcy courts.

PURPOSE OF THE AMENDMENT

The amendment in the nature of a substitute reflects, testimony received by the committee and the changes that resulted. The purpose of the revised bill remains to modernize the bankruptcy law.

INTRODUCTION

In 1970, Congress created the Commission on the Bankruptcy Laws of the United States to study and recommend changes in bankruptcy laws. The Commission became operational in June 1971, and filed its final report with Congress on July 30, 1973. Its report was in two parts. Part I contained the Commission's findings and recommendations.

face, in collecting taxes in bankruptcy proceedings. For example, section 108(c) of the bill extends or suspends the running of the statute of limitations on collection of debts outside of bankruptcy, thereby protect the right of governmental units (and other creditors) to collect debts which are not discharged in the bankruptcy proceeding. Section 501(e) of the bill gives governmental tax units a minimum period of time within which to file proof of their claims in a title 11 proceeding. Section 502 of the bill eliminates a requirement included in H.R. 8200 as § 502(i) that a tax authority file a proof of claim for taxes arising out of taxable sales made by the trustee since, in these situations, the trustee has better knowledge than the tax authority of the existence of such a liability for taxes.

The bill also contains several safeguards to assure normal administrative procedures and to prevent tax avoidance. Section 1130(d) provides that a plan of reorganization cannot be confirmed if its principal purpose is the avoidance of taxes. The bill also requires the proponent of a plan of reorganization of a debtor to exhaust administrative processes (in the form of a request for an advance ruling from the Internal Revenue Service) before the bankruptcy court can declare the tax effects of the plan (sec. 1146(d)).

Section 547(b)(2) provides that preferential transfers made by the debtor which may be avoided by the trustee are not to include tax payments, and section 547(c)(6) provides that the fixing of a tax lien is not to be considered a preferential transfer, provided notice of the lien has been duly filed.

TITLE II—AMENDMENTS TO TITLE 28 UNITED STATES CODE AND TO THE FEDERAL RULES OF EVIDENCE

ESTABLISHMENT OF BANKRUPTCY COURT, APPOINTMENT OF BANKRUPTCY JUDGES, AND JURISDICTION

The need for a functionally independent bankruptcy court has been demonstrated beyond question, first by the study and recommendations of the Commission on the Bankruptcy Laws of the United States,[1] by knowledgeable witnesses before the Subcommittee,[2] in published commentary,[3] as well as through long practical experience under the present referee system. A considerable body of opinion has developed in support of the establishment of a bankruptcy court separate from the United States district court, either as an article III court modeled after the present district court,[4] as a separate article I court patterned after the U.S. Tax Court,[5] or as a hybrid court consisting of an article I bankruptcy trial court appended to an article III court of bankruptcy appeals.[6]

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[1] H. Doc. 93-137, pt. I, 93d Cong., 1st sess., Report of the Commission on the Bankruptcy Laws of the United States (July 1973), at 85 et seq.

[2] E.g., Statement of Robert B. Chatz, president, Commercial Law League of America, Hearings before Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, U.S. Senate, on S. 2266 and H.R. 8200, 95th Cong., 1st sess. [hereinafter Senate hearings], 601, 601–603, statement of Robert J. Grimmig, member, American Bankers Association Bankruptcy Task Force, Senate hearings, at 573–574; statement of Charles A. Horsky, chairman, National Bankruptcy Conference, Senate hearings, at 831–832; statement of Hon. David A. Kline, president, National Conference of Bankruptcy Judges, Senate hearings, at 436, 437–439; statement of Harold Marsh, chairman, Commission on the Bankruptcy Laws of the United States, Senate hearings, at 480–481.

[3] E.g. Broude, "Jurisdiction and Venue Under the Bankruptcy Act of 1973," 48 Am. Bankr. L.J. 231 (1974); Cyr, "Setting the Record Straight for a Comprehensive Revision of the Bankruptcy Act of 1898," 49 Am. Bankr. L.J. 99 (1975); Cyr, "Structuring a New Bankruptcy Act: A Comparative Analysis," 52 Am. Bankr. L.J. 141 (1978); King, "Bankruptcy Code—Specialized Court Supported," 52 Am. Bankr. L.J. 193 (1978); Lee, "A Critical Comparison of the Commission Bill and the Judges' Bill for the Amendment of the Bankruptcy Act," 49 Am. Bankr. L.J. 1 (1975). But see Rifkind, "Bankruptcy Code—Specialized Court Opposed," 52 Am. Bankr. L.J. 137 (1978).

The justifications for each proposal have been fully aired and considered. It is the view of the subcommittee that the establishment of the new bankruptcy court as an adjunct of the U.S. district court offers several important advantages:

(1) The presently established U.S. district courts can serve as article III repositories for the broadened jurisdiction essential to efficient judicial administration in bankruptcy cases.

(2) The expanded jurisdiction vested in the U.S. district courts may be delegated by statute for exercise exclusively by bankruptcy judges, subject always to review, as under present law, by the district courts. Certain perceived constitutional impediments[7] to the exercise of the judicial power of the United States by nontenured judges are thus eliminated.

(3) The dislocations associated with continued evolution of the present referee system into a functionally independent adjunct of the district court are minimal in comparison to those attendant upon the establishment of a separate bankruptcy court system.

(4) The fragmentation of Federal court jurisdiction envisioned by some is thus avoided.

(5) The convenience and economy of district court appeals are preserved.

The court of appeals of each circuit will appoint bankruptcy judges for its circuit. Compensation will be at the current annual rate of $48,500, an income level believed by the committee to be commensurate with the duties of the office.

Qualifications for bankruptcy judges include bar membership in good standing for at least five years at the time of appointment and competence as determined by the judicial council of the circuit. Additional qualification standards may be prescribed by the Judicial Conference of the United States.

The appointment of bankruptcy judges by the district court has contributed significantly (1) to a real and apparent dependency on the part of the bankruptcy court and its judges upon the district courts which appoint and review the decisions of bankruptcy judges, and (2) to the image of the bankruptcy court as the stepchild of the district court.[8] This bill is designed to eliminate both the real and apparent dependency and subservience of the bankruptcy court, in part by vesting the power to appoint bankruptcy judges in the courts of appeals, rather than in the district courts. The change is further warranted by the need to do away with the unseemly appellate practice whereby the district judge or judges who appoint the bankruptcy judge often rule on appeals from the orders of their own appointees.

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[4] Report of the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 95th Cong., 2d sess., (committee print 13, Jan. 1978). See note 3 supra.

[5] See Commission report note 1 supra.

[6] See Cyr, "Structuring a New Banruptcy Court: A Comparative Analysis," 52 Am. Bankr. L.J. 141 (1978).

[7] See note 4 supra.

[8] *See, e.g.*, Statement of Charles A. Horsky, chairman, National Bankruptcy Conference, Senate hearings at 832.

There will be a twelve-year term of office for bankruptcy judges appointed under new 28 U.S.C. § 152. The present six-year term is insufficient to attract the calibre of individual needed to perform the highly demanding and important functions of the office of bankruptcy judge. By doubling the term of office for future bankruptcy judges it is anticipated that a major goal of this reform legislation, the establishment of a functionally independent bankruptcy court, can be further advanced.

Subsection (c) prescribes a twelve-year term of office for bankruptcy judges appointed under new 28 U.S.C. § 152.

A bankruptcy judge whose term expires is permitted to continue to serve until a successor is appointed and qualifies. With specific exceptions for retired or reserve military personnel, a bankruptcy judge may not hold employment with the United States Government. An individual may not continue to serve as a bankruptcy judge after reaching seventy years of age without the unanimous approval of the judges of the judicial council of the circuit.

Subsection (d) prescribes the same oath of office for bankruptcy judges as for district court judges.

Subsection (e) requires each bankruptcy judge to maintain residence in a district for which he is appointed, or in the case of the District of Columbia, within 20 miles.

Subsection (f) authorizes the chief judge of the circuit to require a bankruptcy judge to maintain his abode in or near a particular place in the district, unless the bankruptcy judges are able to agree among themselves which of them shall do so.

A bankruptcy judge whose term expires is permitted to continue to serve until a successor is appointed and qualifies.

The bill provides grounds upon which and prescribes the procedures by which the removal of a bankruptcy judge may be accomplished. Incompetence, misconduct, neglect of duty, and disability, as determined by the judicial council of the circuit, are the sole grounds for removal. The bankruptcy judge is entitled to be heard on the charges against him.

A major impetus underlying this reform legislation has been the need to enlarge the jurisdiction of the bankruptcy court in order to eliminate the serious delays, expense and duplications associated with the current dichotomy between summary and plenary jurisdiction, a wasteful remnant of the referee system left over from the pre-Chandler Act era. For fully four decades, and more notably during the present decade, referees in bankruptcy have served as trial judges of the bankruptcy court whose orders are final unless a timely appeal is taken to the district court. Yet the jurisdictional limitations presently imposed on the bankruptcy courts have embroiled the court and the parties in voluminous litigation whose sole function is to determine whether the court possesses the requisite summary jurisdiction to determine the merits of issues often necessarily heard by the court in determining its jurisdictional question. Upon a finding that it lacks summary jurisdiction, the bankruptcy court is required to dismiss the action, whereupon it is necessary for the parties to proceed anew with a plenary action in either the U.S. district court or an appropriate state court to try issues already substantially tried in the summary proceedings before the bankruptcy court. Frequently, the liquidation of bankrupt estates and the rehabilitation of debtors are significantly prejudiced thereby.

The advent of the Rules of Bankruptcy Procedure, with their automatic reference of most bankruptcy matters to the referee in bankruptcy and their scrupulous insistence upon procedural due process, have underscored the absurdity of perpetuating these jurisdictional limitations in bankruptcy cases arising under title 11 and civil actions and proceedings arising under or related to cases under title 11.

It is the purpose of new section 164 of title 28, United States Code, in conjunction with 28 U.S.C. section 1334, as amended by section 216 of this act, to eliminate entirely the present jurisdictional dichotomy between summary and plenary jurisdiction. Therefore, except where the bankruptcy court abstains from hearing an action or proceeding arising under or related to a case under title 11, all cases under title 11 and all civil actions and proceedings arising under or related to cases under title 11 are to be before the bankruptcy judge.

Jurisdiction in bankruptcy cases and in civil actions and proceedings arising under or related to bankruptcy cases is vested directly in the district courts by 28 U.S.C. section 1334, as amended by section 216 of this act, consistent with the establishment of new bankruptcy courts as adjuncts of the United States district courts, pursuant to 28 U.S.C. section 151. Sections 164 and 1334 of title 28, United States Code, as enacted and amended by sections 201 and 216 of this bill, while conferring expanded jurisdiction in bankruptcy cases and related civil actions and proceedings directly upon the district courts, delegate the exclusive exercise of that jurisdiction at the trial level to bankruptcy judges, except as provided in subsection (d)(2) of section 1334, as amended.

Appeals from judgments and orders of a bankruptcy judge will go initially to the U.S. district court for the district in which the case, action, or proceeding in which the order or judgment appealed from, was entered is pending. Appeals may be taken by writ of certiorari from the district court to the United States court of appeals for the circuit in which the bankruptcy court is located, 28 U.S.C. § 1291. The initial appeals to the district court will aid in the expeditious processing of appeals and will not increase the costs to litigants. It will also prevent the overburdening of the appellate courts. *See* testimony of Judge Ruggero J. Aldisert, Senate hearings at page 414.

RETIREMENT PROVISIONS

Under existing law, referees (also designated "bankruptcy judges" by Bankruptcy Rule 901) are classified as ordinary civil service employees for retirement purposes[9] and their annuities are computed by the same formula that applies to the many other groups in the same classification, i.e., the average of the consecutive three highest yearly

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[9] Title 5 U.S.C. § 8331. Federal judges are expressly excluded and separate treatment is given congressional employees. See n. 2, infra.

95th Congress *1st Session*	HOUSE OF REPRESENTATIVES	Report No. 95–595

BANKRUPTCY LAW REVISION

REPORT

OF THE

COMMITTEE ON THE JUDICIARY

together with

SEPARATE, SUPPLEMENTAL, AND SEPARATE ADDITIONAL VIEWS

[Including Cost Estimate of the Congressional Budget Office]

[To accompany H.R. 8200]

September 8, 1977.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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is adjustments to the courts of appeals system. The addition of more judges to the courts will ease some problems.[303] Clearly, the appropriate solution is not to adopt an "anomalous" system as a means of avoiding a problem that plagues bankruptcy and nonbankruptcy litigants alike. H.R. 8200 does not. The bill provides for direct appeals to the courts of appeals as the solution most in conformity with general appellate practice.

V. Jurisdiction

A. JURISDICTION UNDER CURRENT LAW

Under the current bankruptcy law, the jurisdiction of the bankruptcy is limited [304] by the concept of possession, either actual or constructive,[305] or consent, either express or implied. An enormous case law has developed around this provision. Volumes have been written on what constitutes adequate possession to give the bankruptcy court jurisdiction, and on what constitutes adequate consent. The Bankruptcy Rules promulgated by the Supreme Court take the position that a failure to object to jurisdiction constitutes consent.[306] One bankruptcy judge has termed this "jurisdiction by ambush." The issue of the jurisdiction of the bankruptcy court has been litigated in every volume of the Federal Reporter.[307] Intervening amendments of the Bankruptcy Act have not significantly affected the volume of this litigation. In an area of law in which time is of the essence,[308] the delay attendant upon litigation over jurisdiction is needless and expensive.

The Commission on the Bankruptcy Laws of the United States described in detail the current jurisdiction of the bankruptcy courts, the problems the limited jurisdiction has caused, and the reasons for the expansion of the jurisdiction of the bankruptcy courts:[309]

> B. Distribution of Jurisdiction of Judicial Matters.
>
> The first and most important objection to the present dispensation is the division of labor between the bankruptcy court and other courts. The following categories of jurisdiction are given the bankruptcy court:
>
> (1) Matters of administration, including determination of all issues arising in connection with petitions that initiate cases under the Act; selection of the officers, their attorneys, accountants, et al. that administer estates; the conduct of creditors' meetings and examinations; the determination of exemptions; the determination of claims; the sale of assets; the distribution of proceeds of estates; the granting or denial of discharges and confirmation of plans; the allowance of fees and expenses payable out of estates;

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[303] Bills cited, note 290 *supra;* Remarks of Chief Justice Warren E. Burger, *supra* note 79; Bork Comm. Rep. 5.

[304] Except in cases under chapter X; sec. 102. *See* Williams v. Austrian, 331 U.S. 642 (1947); Schumacher v. Beeler, 293 U.S. 367 (1934).

[305] Murphy v. John Hofman Co., 211 U.S. 562 (1909).

[306] Rule 915(a).

[307] MacLachlan, *Scope of the Summary Jurisdiction of the Bankruptcy Court*, 40 COLUM. L. REV. 489, 490 n. 2 (1940).

[308] Katchen v. Landy, 86 Ct. 467 (1966)

[309] COMMISSION REPORT, pt. I, at 88–92.

(2) Determination of all disputes affecting property in the custody of the court, including that in the possession of the bankrupt on the date of bankruptcy and the property to which the debtor had title at the date of the filing of a reorganization petition;

(3) Determination of all controversies arising in the course of administration of estates under the Act in which the adverse parties consent or waive objections to the court's jurisdiction;

(4) Determination of all controversies arising in the course of administration in which no objection to jurisdiction is asserted by anyone with a substantial adverse interest;

(5) Particular proceedings of which jurisdiction is conferred explicitly by statute, including those determining the dischargeability of particular debts (§§ 2a(12) and 17c), the rights of nonbankruptcy liquidators and custodians appointed within four months of bankruptcy (§§ 2a(21), 69d, and 70a(8)), damages recoverable on bonds furnished pursuant to the Act (§ 50n), the right to trustees to recover dividends determined to be excessive (§ 57-1), and the voidability of liens obtained by judicial proceedings without four months of bankruptcy (§ 67a); and

(6) Particular proceedings of which jurisdiction has been construed to vest in the bankruptcy court by implication of the Act, including proceedings to examine transactions between the bankrupt and his attorney and to avoid unreasonable charges or payments (§ 60d).

Litigation of kinds of controversies not appearing in the above list must be instituted in a nonbankruptcy court although they involve an estate undergoing administration pursuant to the Bankruptcy Act and may seriously affect the rights of the debtor and creditors in the case. Confusing provisions in sections 60b, 67d, and 70e appear to give the courts of bankruptcy and state courts concurrent jurisdiction of plenary proceedings under these provisions. However, uniform construction has required the trustee to confine his choice to a United States district court or a state court, unless there is some other ground to litigate the matter in the bankruptcy court.[23] Thus, a considerable part of a trustee's litigation to recover assets of the estate must be initiated in some court other than the bankruptcy court.[24] Moreover, certain categories of litigation against the trustee can be commenced in a court other than the bankruptcy court at the option of the plaintiff.[25]

There are several objectionable results to the division of jurisdiction of the judicial business generated by bankruptcy cases. The first is delay. Not only are the proceedings in nonbankruptcy courts likely to be paced more slowly with longer intervals between successive steps, but the dockets of the nonbankruptcy courts are likely to be more crowded and commencement of the trials more likely to be postponed in such courts than in bankruptcy courts. Delay is critical in cases under the Bankruptcy Act, particularly in the business cases where litigation is most likely to occur. This is true because of the prejudicial effect it might have on prospects for rehabilitating an enterprise in financial distress and the aggravated risk of deterioration of the estate in the course of liquidation.[26]

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[23] 2 Collier, *Bankruptcy* ¶ 23.15 at 605, 622-23 (14th ed. 1971) (hereinafter cited as Collier] ; MacLachlan § 197, at 213.

[24] See 2 Collier ¶¶ 23.12-23.21, at 588 (1961) : MacLachlan § 197, at 212-214.

[25] See 28 U.S.C. § 959, making trustees, receivers, and managers of property engaged "in carrying on business connected with such property" usable "without leave of the court appointing them." See 2 Collier ¶¶ 23.15, 23.16, 23.19, 23.20 (1961) ; Mussman & Riesenfeld, *Jurisdiction in Bankruptcy*, 13 Law & Contemp. Prob. 88, 100 (1948) ; Ross, *Federal Jurisdiction in Suits by Trustees in Bankruptcy*, 20 Iowa L. Rev. 565 (1935).

Another objection to the division of jurisdiction is the extra expense entailed by the estate in litigating outside the bankruptcy court. The expense differential is likely to be most pronounced when it is necessary for the trustee to sue the adversary party in a distant court. The greater convenience of the forum of the bankruptcy court to the trustee may, of course, be a decided disadvantage to his adversary, and no fair system of judicial administration can consider only the convenience and expense of one party to a dispute in litigation. Nonetheless, it is common knowledge that trustees have often foregone litigation to recover assets of estates because of the potential expense and other difficulties of litigating in distant courts, having limited resources with which to wage such litigation. What is needed is a system which diminishes the handicaps imposed on litigation by the trustee in the bankruptcy court by the jurisdictional limitations, while providing a mechanism for assuring convenience to all parties to particular litigation and ensuring that the more general public interest in a fair and expeditious disposition of the litigation will be appropriately balanced in the final selection of a forum.

The most serious objection to the division of jurisdiction is the frequent, time-consuming, and expensive litigation of the question whether the bankruptcy court has jurisdiction of a particular proceeding. As Professor MacLachlan has observed, "When a 'summary' proceeding in the bankruptcy court is appropriate and when a plenary suit is required is one of the most involved and controversial questions in the entire field of bankruptcy." [27]

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[26] The Supreme Court has often acknowledged that Congressional concern that bankruptcy cases be expedited: ". . . [T]his Court has long recognized that a chief purpose of the bankruptcy laws is 'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period.' *Ex parte* Christy, 3 How. 292, 312, and that provision for summary disposition, 'without regard to usual modes of trial attended by some necessary delay,' is one of the means chosen by Congress to effectuate that purpose. Bailey v. Glover, 21 Wall. 342, 346. See generally, Wiswall v. Campbell, 93 U.S. 347, 350–351; U.S. Fidelity Co. v. Bray, 225 U.S. 205, 218." Katchen v. Landy, 382 U.S. 323, 328 (1966).

[27] MacLachlan § 24. The author of the Note, *Scope of the Summary Jurisdiction of the Bankruptcy Court*, 40 Colum. L. Rev. 489, 490, n.2 (1940), observed that the issue whether the court had summary jurisdiction had been litigated in every volume of the Federal Reporter and Federal Supplement from 1898 to the time the article was written. Intervening amendments of the Bankruptcy Act have not significantly affected the volume of this litigation.

Generally, time is on the side of the defendent. If he can subject the plaintiff trustee to the necessity of suing in another court, he can gain the additional time which that necessity imposes on the trustee. Similarly, the extra expense entailed by the estate when the trustee is forced to sue elsewhere gives his adversary a counter for bargaining with him. Even when the trustee is likely to prevail in a contest over whether the bankruptcy court has jurisdiction, the adversary by merely litigating the issue of jurisdiction may gain most of the advantages he would get if he won on the jurisdictional issue, *viz.*, time and bargaining leverage against the trustee. Thus, the adversary has a strong incentive to press his jurisdictional objections to the bankruptcy court's jurisdiction up through the appellate courts. There is a further objection parties have to waging litigation against the trustee in the bankruptcy court which is a characteristic attributed to the court itself, namely, its "collection-mindedness."[28] Whether this characterization is justified is not pertinent so far as the point being made here is concerned: The pervasive belief of the bar that the trustee has a friendly forum in the bankruptcy court is itself a reason for persistent and protracted litigation of jurisdictional issues by adversaries seeking to stay out of the court.

A comprehensive grant of jurisdiction to the bankruptcy courts over all controversies arising out of any bankruptcy or rehabilitation case would greatly diminish the basis for litigation of jurisdictional issues which consumes so much time, money, and energy of the bankruptcy system and of those involved in the administration of debtors' affairs.[29] It would foster the development of a more uniform, cohesive body of substantive and procedural law which would be applicable to the administration of estates under the Bankruptcy Act. The withdrawal from state and federal district courts of jurisdiction of the so-called plenary proceedings, when coupled with the establishment of uniform federal standards and rules, as proposed by the Commission for adoption and application in lieu of the diverse state laws governing debtors' and creditors' right, should eliminate a source of uncertainty and division of authority which has characterized bankruptcy law.

A significant step in this direction was taken by Congress in 1970 with the amendments of the provisions of the Bankruptcy Act which deal with exceptions to discharge.[30] Since 1898, in all but extraordinary situations the effect of a discharge had been a matter which would be determined only in a state court or, where there was some ground of jurisdiction other than the involvement of the discharge, in a federal court. Congress became convinced that relegating a discharged bankrupt to other courts for vindication of his discharge resulted so often in the loss of its intended benefit and frustration of the objective of the federal legislation that jurisdiction of determining the effect of a discharge was given to the bankruptcy court.[31]

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[28] MacLachlan § 205 at 226.

[29] Litigation of jurisdictional issues would not be eliminated since the existence of jurisdiction is always questionable in a federal tribunal. As part of the federal government the bankruptcy courts would be courts of limited jurisdiction, and it would always be open to a party haled into such a court to object that there was not sufficient connection between the litigation and any legitimate federal concern to warrant the assumption of jurisdiction. See MacLachlin § 197, at 212.

[30] Pub. Law 91-467, 84 Stat. 992 (1970), amending §§ 2a(12), 17, and 38.

Considerations similar to those underlying the amendatory legislation of 1970 warrant the expansion of the bankruptcy court's jurisdiction to determine rights respecting exempt property set apart pursuant to the proposed Bankruptcy Act. The Commission proposes use of federal standards for identifying and measuring exempt property to be set apart for debtors who come into the bankruptcy court.[32] To the extent that these standards diverge from exemptions available under state law, state courts will not be inclined to give full and uninhibited effect to the federal law and the construction given it by the bankruptcy courts and the agency. This disinclination is likely to be aggravated by the fact that exemptions will typically have been set apart by the administrator without any judicial determination. A policy of judicial hostility by state courts toward the exemption allowed by the administrator and the bankruptcy courts would frustrate the objective of a uniform federal policy sought to be established by the Act. The untoward possibilities are suggested by the progeny of *Lockwood* v. *Exchange Bank*[33] and such cases as *Charnesky* v. *Urban*,[34] where despite a failure of a creditor to perfect his security interest in collateral that was partially exempt, the creditor was able to defeat the debtor's exemption in the equity.

The constitutionality of a grant of a jurisdiction in such comprehensive terms should not be subject to any serious doubt. The jurisdictional grants to the court of bankruptcy by the Acts of 1841 and 1867 were almost as extensive, and the Supreme Court gave the provisions of those Acts a generous construction and approval of their constitutionality.[35] There appears to be no reason why Congress cannot in the exercise of its power under the Bankruptcy Clause of the Constitution confer jurisdiction over all litigation having a significant con-

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[31] See Countryman, *The New Dischargeability Law*, 45 Am. Bankr.L.J.1 (1971); Shuchman, *The Fraud Exception in Consumer Bankruptcy*, 23 Stan.L.Rev. 735, 765–69 (1971); Shuchman, *Impact Analysis of the 1970 Bankruptcy Discharge Amendments*, 51 N.C.L.Rev. 233 (1972); Note 69 Mich.L.Rev. 1347 (1971); Comment, 1971 Wis.L.Rev. 1174.

[32] See § 4–503.

[33] 190 U.S. 294 (1903). The *Lockwood* case is subjected to criticism in Kennedy, *Limitations in Bankruptcy*, 45 Iowa L.Rev. 445, 462–69 1960); Comment, 68 Yale L.J. 1459, 1476–78 (1959); *cf.* Riesenfeld, *Creditors' Remedies and Debtors' Protection* 595 (1967).

[34] 245 Wis. 258, 14 N.W.2d 161 (1944).

[35] *Ex parte* Christy, 44 U.S. (3 How.) 292 (1845); Bailey v. Glover, 88 U.S. (21 Wall.) 342 (1874); Lathrop v. Drake, 91 U.S. 516 (1875).

> nection with bankruptcy.[36] Indeed, it could not be contended otherwise without challenging the jurisdictional provisions of the present Bankruptcy Act. Section 2a(7) of the Act confers jurisdiction on the courts of bankruptcy over the determination of controversies "in relation to" the estates of bankrupts "except as herein otherwise provided." By clear implication § 23b recognizes that courts of bankruptcy have jurisdiction of any action brought there by a receiver or trustee "by consent of the defendant." Since consent of the parties cannot create jurisdiction of the subject matter in a court which has not been vested with it by a valid legislative act, Congress may be said to have given comprehensive jurisdiction to the bankruptcy courts under the Act with respect to all litigation arising from the administration of the estate of any eligible or amenable debtor, while in certain situations limiting the exercise of this jurisdiction to accommodate the convenience of adversaries of a receiver or trustee.[37]

The dichotomy of jurisdiction adopted in 1898 and contained in current law was a change from former bankruptcy acts.[310] It was originally adopted primarily for reasons of convenience of the parties. In 1898, federal courts were not so easily accessible as they are today. Communications and travel were more difficult, and State courts were more dispersed and easier to reach. Today, the rationale for withholding jurisdiction from the bankruptcy courts no longer exists, and the problems generated by limited jurisdiction demand a change in any comprehensive revision of the bankruptcy laws.

The hearings before the Subcommittee on Civil and Constitutional Rights confirmed the findings of the Bankruptcy Commission relative to the problems created by the limited jurisdiction of the bankruptcy court. Witness after witness argued in favor of increased jurisdiction.[311] The time for change in this aspect of bankruptcy law has come. It is essential to a healthy bankruptcy system.

D. JURISDICTION UNDER H.R. 8200

H.R. 8200 grants the bankruptcy courts broad and complete jurisdiction over all matters and proceedings that arise in connection with bankruptcy cases.[312] Possession of the rest that is the subject of a particular proceeding will not longer be relevant. The bankruptcy courts will have in personam jurisdiction over all proceedings, whether or not involving a specific item of property. All matters arising under title 11, or arising under or related to cases under title 11 will be within the jurisdiction of the bankruptcy court, including proceedings to which the trustee is a party, proceedings to which the debtor is a party if the outcome of the proceeding will have an impact on the case (such as determination of exemptions,[313] determination of dischargeability of debts,[314] liquidation of non-dischargeable debts,[315] and determination of any right granted under title 11), and all proceedings involving the administration of the case. The forum shopping and jurisdictional litigation that have plagued the bankruptcy system, the unfairness to defendants from "jurisdiction by ambush," and the dissipation of assets and the expense associated with bifurcated jurisdiction will be eliminated by the jurisdiction proposed by this bill.

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[36] See, *e.g.*, Schumacher v. Beeler, 293 U.S. 367 (1934); National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 594, 652 n. 3 (1949); Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426, 430 (1924).

"It is well understood that Congress might, under its bankruptcy power, throw into the bankruptcy courts all litigation to which receivers or trustees in bankruptcy properly become parties. Under the Bankruptcy Acts of 1841 and 1867 Congress gave federal courts jurisdiction over all suits between assignees in bankruptcy and adverse claimants. There is no indication that the much more restricted provisions of the Act of 1898 are attributable to constitutional doubts. Local distrust of federal interference with existing practices and a less provincial concern with overloading the federal courts are more relevant." MacLachlan § 219, at 245. See also 1 H. Remington, Bankruptcy § 13, at 27–28 (5th ed. 1950); Mussman & Riesenfeld, *Jurisdiction in Bankruptcy*, 13 Law & Contemp. Prob. 88, 89 (1948).

[37] MacLachlan § 194, at 207, § 219, at 246.

[310] Act of Mar. 2, 1867, c. 176, §§ 1, 2, 14 Stat. 517–18; Act of Aug. 19, 1841, c. 9, § 8, 5 Stat. 440, 446; Schumacher v. Beeler, 293 U.S. 367 (1935); Bardes v. Hawarden Bank, 178 U.S. 524 (1900); 2 COLLIER ON BANKRUPTCY ¶23.01 (1976).

[311] *Hearings*, pt. 1, at 144–45, 178–80, 238–39, 315, 439, 538–40, 584; pt. 2, at 1022; pt. 3, at 1748.

[312] H.R. 8200 § 243 (proposed 28 U.S.C. 1471(b)).

The broad jurisdiction granted to the bankruptcy courts under the bill is coupled with other changes proposed in current bankruptcy law and practice. The jurisdictional change would not be appropriate without them. The two most important are the change in status of the bankruptcy judges, and the separation of the administrative and judicial functions of the bankruptcy judge. The first is necessary in order to insure high caliber applicants for the position of bankruptcy judge. The jurisdiction proposed by the bill is a powerful one, and should not be granted unless there is some assurance that the judges exercising the jurisdiction will at least as competent as the judges that exercise other Federal jurisdiction. To require litigants that may now litigate before true judges to come into the bankruptcy court is fair only if the judges of the bankruptcy court are equal to the task of deciding the highly complex issues that arise in connection with bankruptcy cases. "The importance and difficulty of issues coming before the bankruptcy judges will be entirely comparable to those coming before United States district court judges and judges of state courts of general jurisdiction."[316]

The second change is essential if bankruptcy courts are to become fair and unbiased fora. This change is discussed in detail in chapter 2. A bankruptcy judge that participates on one side of a case cannot be expected to resolve disputes fairly, no matter how well-intentioned he is. Without the separation of administrative and judicial functions proposed by the bill, an expansion of jurisdiction would work to the severe disadvantage of all adverse litigants against the estate.[317]

The Bankruptcy Commission was especially strong in its statement of the need for separation of the administrative and judicial functions as a minimum for fairness in the bankruptcy courts, and as a concomitant of the grant of full jurisdiction to dispose of bankruptcy cases:[318]

> A more substantial factor relates to the effect of the referee's involvement in administering an estate on his ability to act

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[313] *See* Lockwood v. Exchange National Bank, 190 U.S. 294 (1903); COMMISSION REPORT, pt. I, at 91.

[314] *See* sec. 17c, 11 U.S.C. 35c (1970).

[315] *See* id.

[316] COMMISSION REPORT, pt. I, at 93.

[317] *See Hearings*, pt. 3 at 1748.

[318] COMMISSION REPORT, pt. I, at 93–94.

judicially in resolving any controversies which arise.[43] After a referee has read the debtor's petition, schedules, and statement of affairs, and has examined him and others at the first meeting of creditors, it is obviously difficult to resolve questions arising in a proceeding to determine whether the debtor ought to be discharged or even whether a particular debt is dischargeable, without being influenced by information and impressions gained during his previous contact with the debtor and the papers in the case. When the referee has appointed, or approved the appointment of, a trustee to take charge of the property of the estate, has supervised and perhaps instructed the trustee in the performance of his duties, and has approved the trustee's choice of counsel and the initiation of an action, the referee may not appear to the trustee's adversary as one fitting the model of judicial objectivity. The problem is aggravated in metropolitan centers where there is sufficient concentration of bankruptcy business for a specialized bankruptcy bar to develop. Members of the specialized bar are a valuable source of knowledgeable and capable trustees on whom the referee is able to draw when creditors do not elect a trustee. The involvement of the referee in the administration of estates entails numerous conferences and communications that are informal and *ex parte*. The responsibility resting on a conscientious referee under the present Act is thus conducive to the development of what appears to attorneys who are not included among the specialists, to their clients, and to the public generally, as an unseemly and continuing relationship between the referee and the members of the specialist bar. He is thus vulnerable to being linked by imputation to the so-called "bankruptcy ring," which is the opprobrious label frequently given to the specialized bankruptcy bar in a community.

Without undertaking to determine whether the criticisms of referees for permitting their relationships with the bankruptcy bar to become too close are justified, the Commission believes that making an individual responsible for conduct of both administrative and judicial aspects of a bankruptcy case is incompatible with the proper performance of the judicial function. Even if a paragon of integrity were sitting on the bench and could keep his mind and feelings insulated from influences which arise from his previous official connections with the case before him and with one of the parties to it, he probably could not dispel the appearance of a relationship which might compromise his judicial objectivity. The Commission accordingly recommends that the bankruptcy judges be removed from the administration of bankrupt estates and be restricted to the performance of essentially judicial functions, that is, primarily to the resolution of disputes or issues involving adversary parties and matters appropriate for judicial determination.

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[43] See MacLachlan, § 186, at 196–97, § 205, at 228; Gendel, *Summary Jurisdiction in Bankruptcy Related to Possible Referee Disqualification*, 51 Calif. L. Rev. 733, 757–58 (1963); Katcher, *Image of the Bankruptcy Court*, 40 Ref.J. 7, 9 Treister, *supra* note 40, at 8–89.

Third, in order to insure that the jurisdiction of the bankruptcy court is exercised only when appropriate to the expeditious disposition of bankruptcy cases, the bill codifies present case law relating to the power of abstention in particular proceedings by the bankruptcy court. Occasions arise when determination of an issue is best left to a court that decides similar issues regularly, especially if the issue is one that requires a particular expertise that the bankruptcy court does not have. For example, in *Thompson v. Magnolia Petroleum*, the Supreme Court required a bankruptcy court to defer to a State court for determination of a particularly unusual question of State real property law.[319] The power of abstention is necessary to the effective and meaningful exercise of the expanded jurisdiction granted by this bill.

The Committee also considered a different, more limited, jurisdiction for the bankruptcy courts. Under the proposal, the bankruptcy courts would retain their present jurisdiction based on possession or consent, but would also be permitted to assert jurisdiction over a proceeding if the party bringing it could demonstrate detriment to the estate from requiring the proceeding to proceed in a forum other than the bankruptcy court, such as undue delay in the administration of the case or the closing of the estate. The proposal is inadequate to alleviate the problems that exist under the current jurisdictional framework, and would generate problems of its own in its administration.

The amount of litigation over the jurisdiction of the bankruptcy court is already excessive. The proposal would add an additional ground on which parties could litigate the issue and cause delay. This would increase rather than decrease the amount of judicial time spent on jurisdiction. It would not solve the problems of "jurisdiction by ambush," but would give the bankruptcy trustee an additional weapon with which to ambush an unsuspecting defendant. These problems would arise if trustees attempted to use this new jurisdiction of the bankruptcy court. For practical reasons, however, trustees may avoid it altogether.

Presumably, an order of the bankruptcy court refusing to accept jurisdiction and, in effect, remanding the matter to another court would not be appealable, in the same manner that an order of the United States district court remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise.[320] However, an order of the district court accepting jurisdiction of a removed case and remand is correctible on appeal. Where a case is improperly accepted by the United States district court, a party having saved the point in the record, may have the error corrected on appeal after final decree below.[321] Thus, even though a trustee may win a case on the merits against a third party in the bankruptcy court, the judgment would be subject to reversal on appeal on a finding by the appellate court that the bankruptcy court erred in accepting jurisdiction of the case. The only way to avoid underlying jurisdictional uncertainty would be for the trustee to file all suits in courts other than the bankruptcy court and accept gracefully any inherent delay.

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[319] 309 U.S. 478 (1940).

[320] 28 U.S.C. 1447(d) (1970). *See* H.R. 8200 § 243(a) (proposed 28 U.S.C. 1478(b)).

[321] Edrington v. Jefferson, 111 U.S. 770 (1884); Morgan v. Kroger Grocery & Baking Co., 96 F.2d 40 (8th Cir. 1938); Coburn v. Hill, 103 F. 340 (6th Cir. 1900). *See* Thermtron Products, Inc. v. Hermansforder, 423 U.S. 336 (1976).

Finally, in many areas of policy, it is appropriate to leave to the courts to determine on a case-by-case basis the need for remedies. In this area, however, that kind of solution is not a solution at all, but the source of the problem that exists in the current system. The issue is one that must be resolved by a legislative finding that the current limited jurisdiction of the bankruptcy courts operates to the detriment of bankruptcy litigants, creditors, and debtors, and a legislative determination that the bankruptcy courts have the jurisdiction necessary to dispose of bankruptcy cases expeditiously.

CONCLUSION

The bankruptcy court system continues to operate today despite an antiquated law that limits its effectiveness. The increasing burden being placed on the system demands that the system be made workable and efficient before the burden becomes intolerable. The time has come for the formal separation of the bankruptcy courts and judges from the district courts, where they have labored under serious limitations. The rights of bankruptcy litigants entitle them to no less.

Article III of the Constitution establishes the norm of a life-tenured Federal judiciary. Although the case law has permitted departure from this norm in specific instances, none of the traditional reasons advanced for such a departure apply with respect to the establishment of a bankruptcy court system. Moreover, there is a substantial doubt that a nontenured bankruptcy court could be constitutionally permitted to exercise a complete grant of the powers and jurisdiction necessary to adjudicate bankruptcy cases.

As the bankruptcy courts are recognized as an integral part of the Federal judiciary, full constitutional stature will permit equal participation within the Judicial Branch by the bankruptcy judges, and will attract the high caliber judges needed to serve in this complex and demanding area. The rights of litigants, both debtors and creditors, to a full constitutional court must also be considered. This is not [323]

> a problem of a "highly theoretical nature." Far from being "theoretical" it is intensely practical, for it deals with powers of judges . . . over vast property interests in complicated trials customarily involving the right to trial by jury.

With billions of dollars and hundreds of thousands of debtors and creditors moving through the bankruptcy courts annually, the court system should be no less than that provided other litigants in the Federal system. H.R. 7330 achieves these goals.

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[323] Glidden Co. v. Zdanok, 370 U.S. 530, 589, 590 (1962) (Douglas, J., dissenting).

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BANKRUPTCY COURTS

REPORT

OF THE

SUBCOMMITTEE ON
CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
NINETY-FIFTH CONGRESS
SECOND SESSION

ON

HEARINGS ON THE COURT ADMINISTRATIVE STRUCTURE
FOR BANKRUPTCY CASES
DECEMBER 12, 13, 14, 1977

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BANKRUPTCY COURTS

H.R. 8200 represents the first major bankruptcy law revision in 40 years. It has been under study for nearly 7 years, beginning in 1971 with the congressionally created Commission on the Bankruptcy Laws of the United States. The bill, a bipartisan effort, was reported unanimously by the Subcommittee on Civil and Constitutional Rights on May 16, 1977. The Committee on the Judiciary reported the bill favorably on July 19, 1977, by a vote of 26–3, with one Member voting present, and re-reported the bill, after adoption of an amendment requested by the Ways and Means Committee, on September 8, 1977, by a vote of 23–8.

The House began consideration of H.R. 8200 on October 27, 1977. On Friday, October 28, 1977, by a vote of 183–158, with one Member voting present and 92 Members absent, the Committee of the Whole adopted an amendment offered by Mr. Danielson. The scope of the amendment and its impact on the bill were so significant that the floor manager, Mr. Edwards of California, immediately moved that the Committee of the Whole rise. That motion was agreed to, and the Committee of the Whole suspended consideration of the bill.

The Subcommittee on Civil and Constitutional Rights held hearings December 12, 13, and 14, 1977, to explore the amendment adopted and alternatives to both the amendment and H.R. 8200. Witnesses included representatives of every major organization that has taken a position on the Danielson amendment.

In order to explain H.R. 8200 and the Danielson amendment, it is first necessary to describe the current court and administrative structure for bankruptcy cases.

THE CURRENT SYSTEM

Unlike most Federal laws, in order for debtors or creditors to use the bankruptcy laws, it is necessary to commence a case in a Federal court. Under current law, bankruptcy cases are filed in district court, but are immediately referred to bankruptcy judges (formerly called referees in bankruptcy).

After the reference, all bankruptcy proceedings are before the bankruptcy judge. Bankruptcy judges' orders are final.

Even though the number of bankruptcy cases exceeds the combined total of all other Federal civil and criminal cases, district judges spend less than 1 percent of their time on bankruptcy cases. There are currently 235 bankruptcy judges who do the work. They are appointed by the district courts for 6-year terms. Their annual salary is $48,500, plus the Government contributes an additional $3,400 annually for retirement benefits.

The staffs of bankruptcy judges are limited. They do not have the assistance of law clerks to aid them in legal research or other tasks.

They do not generally have court reporters to make a record of proceedings in court. Although the Bankruptcy Act specifies that the bankruptcy judges shall have control over their clerks of court, 15 district courts have denied them that control.

Other inadequacies in current law affect litigants more directly. First, the jurisdiction of the bankruptcy court to hear all matters that are necessary to wind up the estate of a bankrupt individual or business is limited. The limits date from 1898, when referees in bankruptcy were unsalaried, ad hoc assistants to district judges. Under those limits, which still exist, a bankruptcy judge may hear a dispute only if it concerns the proper disposition of property that the bankruptcy court has in its possession, or if the defendant in the dispute consents to having it heard before the bankruptcy judge. The limits on jurisdiction are not based on the subject matter of the dispute, the law on which the dispute turns, or the existence of a State, as opposed to a Federal, interest in the dispute. Thus, bankruptcy judges currently hear a full range of Federal and State law issues, so long as possession or consent is present.

Litigation over jurisdiction in the bankruptcy court has abounded. Because determination of a dispute in a court other than the bankruptcy court takes substantially longer, the trustee in bankruptcy, whose duty is to wind up the affairs of the estate quickly, brings disputes to the bankruptcy court. The defendant, who will always profit by delay, normally objects to the jurisdiction of the bankruptcy court. Litigation over the limited jurisdiction wastes an enormous amount of bankruptcy court time, delays creditors from getting their money, and often causes the trustee to abandon lawsuits that he could otherwise pursue for the benefit of creditors. The limited jurisdiction of the bankruptcy court is the most significant problem facing the bankruptcy courts and litigants in the bankruptcy courts today. Not one witness supported the possession/consent limit on jurisdiction.

There are other wasteful limits on bankruptcy courts' powers. The contempt power of the bankruptcy court is limited to a fine of $250. If misconduct is more serious and warrants a higher fine or imprisonment, the issue must go to the district court. As a result, those that deal with the bankruptcy court accord it less respect, making it difficult for the judges to do their jobs. One auctioneer in New York, though ordered by the bankruptcy court not to sell property of the bankrupt estate, defied the court and sold the property, saying, "I've done this before and haven't gone to jail yet."

Bankruptcy judges are currently required by statute to supervise the administration of bankruptcy cases. They must appoint bankruptcy trustees, and consult with them regularly, usually without any adverse party present. Through them, the bankruptcy judge learns much about a case. When later required to decide a dispute, the information the judge has gained from those consultations colors his objectivity as a factfinder. Because he has often worked with the trustee in matters that lead up to the dispute, he is in essence one of the parties to the case. His impartiality and fairness are severely compromised. As Harold Marsh, former Chairman of the Bankruptcy Commission, made clear, "the bar in general does not have confidence in the present court structure."

The current system creates other conflicts of interest. The bankruptcy judge appoints, and then must review, the actions of the trustee. Many litigants feel that they cannot receive a fair hearing in a dispute against a trustee before the judge that appointed their opponent, the trustee. In addition, the district court appoints the bankruptcy judge and then must review his orders. The same appearance of unfairness and conflict of interest exists in that relationship. George Treister of the National Bankruptcy Conference emphasized that the current system "is not working well . . . because too many people, particularly those outside the system, feel it is working unfairly."

Finally, bankruptcy judges are appointed by district courts, and bankruptcy courts are subordinate adjuncts of the district court. Bankruptcy judges are perceived by many as district judges' assistants, and bankruptcy courts are perceived as second-rate, second-class courts. The National Bankruptcy Conference explained:

> Due in large part to its present relationship with the District Court—one that has not been unreasonably referred to as a stepchild position—the bankruptcy court cannot attract sufficient numbers of highly qualified appointees to its bench. An outstanding lawyer does not customarily aspire to be someone else's assistant.

Yet bankruptcy cases are not second-rate or unimportant. There are more bankruptcy cases annually than all Federal civil and criminal cases combined. The cases are not administrative matters, easily processed or categorized. They affect the entire range of Federal and State substantive law. They involve nearly 10 million debtors and creditors annually, over $27 billion of property and nearly $43 billion in creditor's claims. They include Penn Central, W. T. Grant, and Railway Express, and may soon involve major municipalities.

BANKRUPTCY CASES

A bankruptcy case is fundamentally different from an ordinary civil or ciminal case. In an ordinary civil or criminal case, there is one or a group of plaintiffs who sue one or a group of defendants for a specified remedy based on a limited set of issues. The court determines those issues, and then makes whatever order is appropriate. In a bankruptcy case, however, there is one or a group of debtors, and dozens, scores, or hundreds of creditors. The purpose of the case is to collect all of the assets of the debtor, to settle all of the debtor's legal ralationships with others, and to distribute the assets to the creditor's according to their relative rights. It is a process of administration during which disputes concerning the debtor's right to property, the validity of creditors' claims, the debtor's right to a discharge, and innumberale other issues arise, all of which must be determined by a court of law. For example, one witness told the subcommittee that in one recent case in New York involving a major supermarket chain, over 500 separate lawsuits arose during the administration of the case. That is not uncommon.

As a result, bankruptcy cases are handled completely separately from normal civil and criminal cases in the district courts. Bankruptcy judges do virtually all of the judicial work in bankruptcy cases. District judges rarely become involved. Every witness recognized the separate nature of the bankruptcy caseload, and advocated a system under which specialized judicial officers hear bankruptcy cases.

The need for separation is accentuated by the need for speed in bankruptcy cases. While all litigation should be expeditiously terminated, by the nature of bankruptcy, assets are deteriorating in value.

The faster a case is terminated, the more creditors will receive. Both the Congress and the Supreme Court have recognized this at least since the 1840's. Moreover, in a reorganization case, speed is essential to success: Creditors will not wait for a company to reorganize, but will favor liquidation, with the consequent loss of jobs and investments.

H.R. 8200

Title II of H.R. 8200 replaces the current antiquated bankruptcy courts with a system designed to remedy the problems that exist and that will meet constitutional requirements. In place of the 235 bankruptcy judges now sitting as subordinate adjuncts of the district courts, the bill establishes a court that is independent of the district courts. The change in the court will reduce the number of judges needed to far less than 235, though the precise number is left to be determined after a 5-year study and transition period to the new court system.

The judges of the new court will be appointed by the President with the advice and consent of the Senate. Because the Constitution vests the appointment of Federal judges in the President, the bill does not "fold in" the current bankruptcy judges into the new court, but instead retires them at the end of the 5-year transition period.

The bill grants the courts the full staff required for the operation of a Federal court, including clerks, law clerks, and court reporters, though it does not require any new courtrooms, because existing facilities will generally suffice. The hearings indicate that giving bankruptcy judges adequate staff will expedite court business, and will relieve some burden from the judges themselves, thus reducing the number of judges needed.

Jurisdiction of the bankruptcy court is expanded, as recommended unanimously in hearings in both the 94th and 95th Congresses. Under the expanded jurisdiction of H.R. 8200, the bankruptcy court will be able to dispose of all matters relating to bankruptcy cases, and complete them quickly and economically. The expanded jurisdiction of the bankruptcy court will bring some suits into bankruptcy courts that are not heard there today; during the hearings, the Judicial Conference has estimated the number at less than 600 annually. The elimination of litigation over jurisdiction will reduce the judicial time required in bankruptcy cases, and will more than offset the time required to handle the few cases brought in by the expanded jurisdiction of the court. Thus, expanded jurisdiction will also contribute to the reduction in the number of judges needed.

Bankruptcy judges will be given power to enforce their orders, both through the issuance of writs of execution and injunctions, and through the contempt power. The expanded power will add to the effectiveness of the bankruptcy court. It will expedite the handling of bankruptcy cases by placing complete responsibility and control in one place, again reducing the number of judges needed.

Title II of H.R. 8200 also creates the office of U.S. trustee to relieve bankruptcy judges of time-consuming administrative and supervisory functions. The change will eliminate the conflict of interest and pro-estate bias that the Bankruptcy Act now requires of bankruptcy judges, and will insure fairer hearings for all bankruptcy litigants. It will also reduce the time bankruptcy judges will be required to spend on cases, and thus reduce the number of judges needed.

H.R. 8200 eliminates the conflict of interest by completely separating the appointing and reviewing authority for all bankruptcy officials: Bankruptcy judges will be appointed by the President and reviewed by circuit judges; U.S. trustees will be appointed by the Attorney General and reviewed by bankruptcy judges; private trustees will be appointed by U.S. trustees and reviewed by bankruptcy judges.

The bankruptcy court, under H.R. 8200, will meet the requirements of Article III of the Constitution, which states:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .

The expansion of jurisdiction and powers of the bankruptcy court which has been universally recommended, is a grant of "the judicial Power of the United States," and requires that the courts to which that power is granted be created in accordance with article III, whether the court is part of and subordinate to, or independent of, the district courts.

In addition to meeting constitutional requirements, H.R. 8200 would have another benefit. The Attorney General, the Judicial Conference, and other witnesses have emphasized that the prestige of article III status is necessary to attract the best judges to the bench. Bankruptcy courts do not offer that now, and have suffered accordingly. Professor Vern Countryman of Harvard Law School insisted, "We need to elevate the status of this court so that we can attract better people." H.R. 8200 would offer that status, and would make the bankruptcy bench equal in quality to the district court bench.

The court and administrative structure for bankruptcy cases in H.R. 8200 is supported by numerous organizations, including the National Bankruptcy Conference, the Commercial Law League of America, the American Bankers Association, the Robert Morris Associates (the National Association of Commercial Bank Lending Officers), the National Conference of Bankruptcy Judges, and numerous State and local bar associations.

THE DANIELSON AMENDMENT

Description

The Danielson amendment undoes most of the changes from current law contained in H.R. 8200. It returns the bankruptcy courts to the district courts, making them subordinate adjunts of the district courts. It completely deprives bankruptcy judges of control over their clerks and makes no provision for staff, such as law clerks, which could significantly aid the judges in legal research and related matters. There is no provision for court reporters. The amendment adds to the administrative, supervisory, and enforcement duties of the bankruptcy judges.

The Danielson amendment retains the unproductive possession/consent jurisdiction limitation, and adds an additional ground on which to litigate jurisdiction: The bankruptcy court will have jurisdiction if the lack of jurisdiction in a particular instance would cause a loss of assets or have an adverse impact on the estate (the so-called "jurisdiction by detriment" proposal). Litigation over jurisdiction by detriment would be in the district court, adding to their already too heavy caseload, while litigation over possession or consent would proceed in bankruptcy court. Finally, if jurisdiction by detriment exists, the district court, could retain the case itself or transfer it to the bankruptcy court. The amendment permits each district court to have a different rule.

The amendment makes only minor changes in the current court system. It increases the terms of bankruptcy judges from 6 to 15 years, and places the appointment power in the judicial councils of the circuits rather than in the district courts, as under current law.

The amendment retains the U.S. trustee system, but has the U.S. trustees and their assistants appointed by the district courts. The Judicial Conference will determine the number of U.S. trustees and assistant U.S. trustees, and will be responsible for general coordination and assistance.

Problems

The effect of the amendment is to eviscerate title II of H.R. 8200 and to increase significantly the number of bankruptcy judges that will be needed. The lack of provision for adequate staff and the increased administrative duties of the bankruptcy judges will require the judges to do work that could as easily be handled by less expensive personnel, such as law clerks and U.S. trustees. The lack of court reporters will require bankruptcy judges to take and preserve evidence, as they do now, and will deprive litigants of adequate records on appeal. Moreover, the amendment permits the Judicial Conference to determine the number of bankruptcy judgeships, removing important Congressional control over the total number of judges.

The changes in the jurisdiction of the bankruptcy court under the amendment will continue to require the bankruptcy court and the district court to waste too much time determining whether the court has jurisdiction, again increasing the number of judges needed to handle bankruptcy cases. The provision permitting a different jurisdictional rule in each judicial district will encourage forum-shopping and generate uncertainty for both parties and courts. Every witness during the recent hearings, including the Attorney General and the Judicial Conference (which had originally spawned the idea) opposed the Danielson jurisdictional proposal. The National Bankruptcy Conference called it "a step backward." Harold Marsh, former Chairman of the Bankruptcy Commission, called it "an absolute disaster."

Appointment of bankruptcy judges by circuit councils will generate problems as well. Judge Shirley Hufstedler of the U.S. Court of Appeals for the Ninth Circuit testified that the judicial councils:

> . . . don't have any particular reason to do a good job at it. We cover an enormous geographical territory. We simply don't have access, nor staff, to acquire enough information to enable us to do a good job.

Attorney General Griffin Bell, formerly a circuit judge, told the subcommittee that:

> the judicial council won't know anything about who these applicants for jobs in Atlanta are, say. They're going to call the district judges and ask them to tell them; that's where they're going to get the names anyway.

The change of appointment power poses two greater problems. First, the theory on which the amendment tries to avoid the article III requirement of tenured judges is that bankruptcy judges will be officers of, and derive their powers from, the district courts. With the appointment power in the circuit councils, however, they become officers of the circuit councils, and the constitutional theory on which the amendment is supported fails.

More serious, however, the amendment vests the appointment power in the judicial councils rather than in the courts of appeals. In 1976, the Supreme Court made clear that such a provision would violate the Appointments Clause of the Constitution (article II, section 2), which requires appointments by the judiciary to be made by courts of law. Judge Ruggero Aldisert of the U.S. Court of Appeals for the Third Circuit, speaking for the Judicial Conference of the United States, told the subcommittee that a judicial council is not a court of law. Prof. Frank Kennedy of the University of Michigan Law School could not find "any constitutional authority for vesting the authority to appoint in a council." The appointment provision may render the entire court system unconstitutional and unable to exercise any of the powers of a bankruptcy court until Congress adopts remedial legislation. The hundreds of thousands of bankruptcy cases annually are too important to permit such a hiatus.

The Danielson amendment does not adequately separate the administrative and judicial functions of the bankruptcy judges. Significant conflict of interest and patronage problems exist today in the bankruptcy court's appointment of bankruptcy trustees. Placement of the U.S. trustee in the judicial structure adjacent to the bankruptcy court, as proposed by the amendment, will generate the same discredited close relationship between trustees and bankruptcy judges that exists today, and will significantly increase patronage for Federal judges.

The amendment does not completely eliminate the conflict of interest problems in the current system caused by the combination of appointing and review authority. Bankruptcy judges will be appointed by circuit judges on the recommendation of district judges and reviewed by district and circuit judges; United States trustees will be appointed by district judges, and reviewed by bankruptcy judges and district judges.

The two most significant deficiencies in the Danielson amendment, however, are less tangible, but nonetheless important. First, the amendment retains the bankruptcy court as a subordinate adjunct of the district court. As such, it will continue to be perceived as a second-class forum, will fail to attract as high a caliber judge as an independent court would, and will continue to accord bankruptcy litigants second-class treatment. All other Federal litigants are entitled to have their cases heard before a full judge. Only bankruptcy litigants would be relegated to judges' assistants. This becomes more important as the jurisdiction of the bankruptcy court is expended to bring in more and more litigants.

Second, the status of the bankruptcy judge under the Danielson amendment is the same as the status of a U.S. magistrate. The granting of nearly complete case-dispositive powers, contempt powers, and coercive jurisdiction to an official that is, in essence, the equivalent of a magistrate is unprecedented in Federal judicial history. Herbert

Hinkel, Esq., of New York, appearing for the Robert Morris Associates recognized the anamoly of the adjunct system: "To establish this court, to make it less than an article III court, is about as reasonable as passing a law which provided for all Federal cases to be drawn by lot by magistrates, and to be tried by those magistrates."

Though bankruptcy judges exercise many powers today, the expanded jurisdiction proposed by the amendment, even though not as great as that contemplated by H.R. 8200, trespasses on the "judicial Power of the United States," and borders on the unconstitutional. Even if the system is ultimately upheld, the litigation over the extent of the permissible powers of the bankruptcy judges could occupy years, generating uncertainty for millions of litigants and leaving in doubt the disposition of billions of dollars of assets. Mr. Marsh made clear that "any time I represented a defendant in that court, one of the defenses would be that the court itself is unconstitutional."

CONCLUSION

Chairman Don Edwards said toward the end of the hearings:

> For the last 5 or 6 years we have been hearing witnesses—banks, commercial law representatives, merchants, business people, and the general public complaining about the referee system. Actually, we have not had one witness, except the district judges, who have said that it's working well and that we should be proud of it. Incidentally, I include the bankruptcy judges in there. We haven't had a single bankruptcy judge that's ever told this committee or the Commission that the changes as contemplated in H.R. 8200 would not be the best that could happen to the bankruptcy situation in the United States now.

Judges that have opposed H.R. 8200 include the Judicial Conference, former Judge Griffin Bell, Judge Shirley Hufstedler, and Judge Simon Rifkind, speaking for the American College of Trial Lawyers. One reason that has frequently surfaced for their opposition is that article III bankruptcy judges rather than subordinate bankruptcy judges will decrease the prestige of Federal district judges. Judge Edward Weinfeld told the subcommittee, "Any proliferation of the court diminishes its strength in terms of public prestige." To the contrary, John Ingraham, a banker, noted, "Improvement of the status of the Bankruptcy Court would not reduce the stature of the District Court but rather would increase public esteem for the Federal judiciary generally."

Another reason advanced in opposition to H.R. 8200 is that it violates the concept of a unified trial court of general jurisdiction. However, creation of the bankruptcy court as a subordinate court, as the Danielson amendment proposes, does not unify the trial courts. Again, John Ingraham, speaking as a layman, observed, "Even a banker can recognize that today the Bankruptcy Court constitutes a separate court system."

While both H.R. 8200 and the Danielson amendment create a separate court with specially designated judges to hear all bankruptcy cases, the Danielson amendment increases significantly the number of judges needed, and thus the cost of the legislation, because litigation over jurisdiction and the bankruptcy judges' administrative duties both will be increased, unlike H.R. 8200. The Danielson amendment provides inadequate staff, increasing the number of judges needed, unlike H.R. 8200. The Danielson amendment will generate serious constitutional uncertainties concerning the appointment power and the jurisdiction and powers of the bankruptcy courts, unlike H.R. 8200. As one witness emphasized, the amendment "makes bad matters worse without solving anything."

Don Edwards, *Chairman*.
John F. Seiberling.
Robert F. Drinan.
Harold L. Volkmer.
Anthony C. Beilenson.
M. Caldwell Butler.
Robert McClory.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

September 10, 1982

Honorable George Bush
President
United States Senate
2203 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. President:

In my capacity as Secretary to the Judicial Conference of the United States, I am transmitting a Conference Report concerning the present bankruptcy court problem entitled "Northern Pipeline Construction Co. v. Marathon Pipe Line Co. et al. and Proposals for Remedial Congressional Action". As you know, the Judicial Conference is statutorily authorized to coordinate the administration of business conducted by the 111 individual courts which constitute the judicial branch below the Supreme Court and is statutorily required to submit to Congress its recommendations for legislation concerning administration of the courts. The Conference also has an inherent duty to report to Congress on any legislative proposal which will substantially impact upon the management of federal court business.

This Report addresses directly the problem now confronting Congress as a consequence to the Supreme Court's decision in the Northern Pipeline case. After examining the background of the Bankruptcy Reform Act of 1978 and the Supreme Court's decision rendering unconstitutional the exercise of certain power by the existing bankruptcy courts under that Act, the Report explains the Conference's methodology for evaluating all "court restructuring proposals". The Report then explains, in the context of the Conference's evaluation: (1) why the Conference is recommending that the bankruptcy courts not now be restructured and (2) why we believe a clarification of their jurisdiction is a more appropriate and immediately achieveable solution to the problem presently before the Congress.

Because one legislative proposal -- H.R. 6978 -- may be considered by the full House of Representatives in the immediate future, I will briefly summarize the Conference's reasons for recommending that that proposal not be approved. H.R. 6978 would add 94 new general jurisdiction trial courts to the 111 federal courts now serving the Nation. H.R. 6978 would require Presidential appointment with Senate confirmation, pursuant to Article III of the Constitution, of 227 bankruptcy judges within the next six months to one year. The "life tenure" nature of those 227 appointments would preclude removal from office by any method other than impeachment and guarantee salaries of office which could not be reduced.

The Conference opposes enactment of H.R. 6978 for three essential reasons:

- ▶ The mandated reorganization of bankruptcy courts in the bill is neither legally nor constitutionally necessary; a less radical, entirely constitutional, and immediately effective alternative is available to solving the present problem.

▶ The mandated reorganization will be extensively and pervasively disruptive of the administration of the federal judicial system, eventually generating unnecessary trial and appellate work; problems created by inevitable decisional conflicts and the additional administrative bureaucracy of two general jurisdiction trial courts in each district will outweigh any possible advantages in the resolution of a relatively small number of bankruptcy cases.

▶ The mandated reorganization contained in H.R. 6978 will be an unjustifiably expensive response to the present problem -- not only in terms of immediate appropriations consequences -- but also in terms of costs associated with inevitable system-wide adjustments to the "ripple effect" in judicial work at all levels. Our Report contains a detailed cost estimate.

The enclosed Report contains the Judicial Conference's recommended alternative remedy to the present problem before the Congress; a draft bill, section-by-section analysis, and full explanation of the Conference's reasons for recommending its alternative remedy are contained in the Report. We recommend that Congress correct the precise defect in the 1978 Act identified by the Supreme Court in Northern Pipeline -- the need to clarify bankruptcy court jurisdiction. Under provisions in our recommended proposal, presently authorized bankruptcy judges would continue to resolve all bankruptcy cases, and district courts would be expressly authorized to continue exercising jurisdiction over all other cases. District courts would also be authorized to appoint any bankruptcy judge as a special master to resolve any "related" questions of law where efficiency so required. A decision by a bankruptcy judge as a special master would be subject to the district court's approval, just as are magistrates' decisions. We believe our proposal will permit the most efficient utilization of all judicial branch resources, provide an immediate remedy for the pending problem, and entail no cost consequences whatsoever.

On behalf of the Judicial Conference, I thank you in advance for considering the views contained in this Report.

Sincerely,

William E. Foley

William E. Foley
Director

Enclosures

cc: All Members, United States Senate

REPORT
# of the
JUDICIAL CONFERENCE OF THE UNITED STATES

NORTHERN PIPELINE CONSTRUCTION CO. v.
MARATHON PIPE LINE CO. et al

AND

PROPOSALS FOR REMEDIAL CONGRESSIONAL ACTION

Washington, D.C.
1982

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THE JUDICIAL CONFERENCE OF THE UNITED STATES, 28 U.S.C. 331

§331. JUDICIAL CONFERENCE OF THE UNITED STATES

The Chief Justice of the United States shall summon annually the chief judge of each judicial circuit, the chief judge of the Court of Claims, the chief judge of the Court of Customs and Patent Appeals, and a district judge from each judicial circuit to a conference at such time and place in the United States as he may designate. He shall preside at such conference which shall be known as the Judicial Conference of the United States. Special sessions of the conference may be called by the Chief Justice at such times and places as he may designate.

The district judge to be summoned from each judicial circuit shall be chosen by the circuit and district judges of the circuit at the annual judicial conference of the circuit held pursuant to section 333 of this title and shall serve as a member of the conference for three successive years, except that in the year following the enactment of this amended section the judges in the first, fourth, seventh, and tenth circuits shall choose a district judge to serve for one year, the judges in the second, fifth, and eighth circuits shall choose a district judge to serve for two years and the judges in the third, sixth, ninth, and District of Columbia circuits shall choose a district judge to serve for three years.

If the chief judge of any circuit or the district judge chosen by the judges of the circuit is unable to attend, the Chief Justice may summon any other circuit or district judge from such circuit. If the chief judge of the Court of Claims or the chief judge of the Court of Customs and Patent Appeals is unable to attend, the Chief Justice may summon an associate judge of such court. Every judge summoned shall attend, and, unless excused by the Chief Justice, shall remain throughout the sessions of the conference and advise as to the needs of his circuit or court and as to any matters in respect of which the administration of justice in the courts of the United States may be improved.

The conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary, and shall submit suggestions to the various courts, in the interest of uniformity and expedition of business.

The conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.

The Attorney General shall, upon request of the Chief Justice, report to such conference on matters relating to the business of the several courts of the United States, with particular reference to cases to which the United States is a party.

The Chief Justice shall submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation.

INTRODUCTION

The statutory authorization quoted on the facing page embodies Congress' recognition of the Judicial Branch's need to centrally coordinate the administration of all elements in the Federal judicial structure. Created in 1922, the Judicial Conference of the United States has for sixty years served a function which has been analogized to that of a corporate board of directors, an Executive Branch cabinet, or a Legislative Branch policy committee. The Conference formulates policies and procedures to promote the expeditious and effective administration of business conducted by the one-hundred and eleven individual courts which constitute the Third Branch of Government below the Supreme Court.

In testimony presented before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary on May 6, 1981, Judge Elmo B. Hunter, Chairman of the Conference's Committee on Court Administration, explained "the role which the Judicial Conference of the United States performs on behalf of the Third Branch...." During his testimony, Judge Hunter briefly summarized the history of the Federal judiciary's structural growth and the related developments which rendered creation of the Conference inevitable. His testimony also explained the manner in which the Conference performs its work, and the degree to which its communications with Congress have become increasingly more important in recent years. A printed record of Judge Hunter's testimony during that May 6, 1981 Hearing on the "Federal Judicial Branch" is available from the House Subcommittee on Courts, Civil Liberties and the Administration of Justice.[1]

The Judicial Conference presents this report in the context of the working relationship with Congress described by Judge Hunter in May of 1981, in response to recent requests from Members of both the House of Representatives and the Senate, and because it has a statutory -- and an inherent -- duty to report to Congress on all legislative proposals which will impact substantially upon the judiciary's ability to manage its business. In addition to fulfilling its responsibilities concerning administration of the Federal courts, the Conference, in submitting this report, is hopefully also providing Members of both the House and Senate with information which will assist them in their efforts to respond to a problem perceived to be of urgent import.

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[1] *Oversight Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981).

On June 28, 1982 the Supreme Court announced its opinion in *Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.*, et. al. (hereinafter *Northern Pipeline*).[2] Within hours that opinion was widely reported to have declared the Federal bankruptcy court system authorized by the Bankruptcy Reform Act of 1978[3] unconstitutional. Expressly stating that its judgment should not be applied retroactively, the Court also stayed its judgment until October 4, 1981 -- to "afford Congress an opportunity to reconstitute the bankruptcy courts *or* to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws."[4]

Responding to apprehensions that "chaos" would ensue if Congress did not act before October 4, the Judiciary Committees in the House and Senate held hearings to explore the nature of the problem and possible remedies during the week of July 19. Due to the procedures governing the manner in which the Conference conducts its business,[5] witnesses on behalf of the Conference were not able to participate in those hearings. Three Conference committees which were examining proposals for clarifying bankruptcy court jurisdiction *or* restructuring the bankruptcy court system had not yet completed their work. When they had done so, their recommendations were submitted to the Conference's Executive Committee, which acts on behalf of the full Conference when convening the full Conference is not possible.

On August 30, the Executive Committee convened at the Supreme Court Building in Washington. Recommendations submitted by the ten-member Committee on the Administration of the Bankruptcy System, the seventeen-member Committee on Court Administration, and the fifteen-member Committee on the Judicial Branch were reviewed. The Executive Committee unanimously approved the transmission to Congress of:

1. Draft legislation which would amend the Bankruptcy Reform Act of 1978 to provide explicitly that district courts shall remain the trial courts of general jurisdiction, and that bankruptcy courts, as divisions of the district courts, shall continue to have jurisdiction over proceedings under Title 11 of the United States Code involving property claimed by a representative of an estate;

2. Views explaining the Conference's disapproval of proposals which would convert existing bankruptcy courts from divisions of district courts into independent parallel courts of general jurisdiction under Article III of the Constitution; and

3. Additional views contained in this report.

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[2] _____ U.S. _____, 50 U.S.L.W. 4892 (Nos. 81-150 and 81-546, June 28, 1982).

[3] Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549.

[4] 50 U.S.L.W. 4892, at 4902 and 4903 (emphasis added).

[5] See Judge Hunter's testimony, *supra* note 1, at 14-23.

Although the views presented in this report contradict opinions expressed by proponents of bills now pending before the House of Representatives, we believe this report may constructively contribute to the development of reasonable solutions to the real -- rather than the perceived -- problem created by *Northern Pipeline.* We believe we can assist Congress in achieving its objective -- a responsible and sensible remedy to the real problem in a very limited period of time.

In 1977, when we attempted to constructively contribute to the development of proposals which evolved into the Bankruptcy Reform Act of 1978, our efforts were then characterized as obstructionist by implication and inuendo.[6] Before our views are again so characterized, we expressly refute the characterization -- and the implications which it carries concerning our motivation. Judges serving the Judicial Conference -- and *all* judges serving the Federal court system -- are conscientiously dedicated to preserving and protecting a viable court system, responsive to the nation's needs. Those judges who have concluded that fully independent parallel courts of general jurisdiction under Article III of the Constitution are needed for the resolution of cases arising under the bankruptcy laws have so advised the Congress. Those who do not share that view are entitled -- as a simple matter of courtesy -- to present proposals for an alternative approach to solving an immediate problem -- without being accused of doing so for unworthy reasons.

In the following pages we explain what we believe to be the origin of the present problem posed for Congressional resolution by the *Northern Pipeline* decision. We then define "the problem", examine proposed remedies -- recommending an alternative remedy which we believe will be *immediately* effective and adequate -- and delineate what we believe may be relevant policy factors which Congress may wish to assess in choosing a remedy.

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[6] See *generally, Hearings on S. 2266 and H.R. 8200 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary,* 95th Cong., 1st Sess., at 436-480 (1977).

BACKGROUND

Before explaining why we have recommended a specific course of remedial legislative action for Congressional consideration, we believe a brief review of past events which framed the problem for Congress would be valuable. Justice Oliver Wendell Holmes once observed, in a decision concerning tax law, that: "Upon this point a page of history is worth a volume of logic."[7] Just as tax laws are often the product of specialized advocacy in the legislative arena -- and consequently frame litigable questions which can only be resolved with an understanding of that specialized advocacy -- the Judicial Conference believes that "the problem" presently before the Congress as a result of *Northern Pipeline* should be recognized to be a direct consequence of specialized advocacy -- and Congressional efforts to accommodate it almost exactly four years ago. Presently pending legislation which would authorize a complete reorganization of the courts serving the Federal judicial system at the trial level is as directly related to continuing specialized advocacy as it is to (1) the enactment of the expansive court reorganization approved by Congress in the Bankruptcy Reform Act of 1978 and (2) the recent Supreme Court decision which has *expressly* held *only one aspect* of that earlier reorganization to have been unconstitutional.

The Bankruptcy Reform Act of 1978 was the product of Congress attempting to strike a compromise between House legislation (H.R. 8200, 95th Cong., 1st Sess. (1977)) -- which would have established bankruptcy courts as general jurisdiction tribunals fully equivalent to, and thoroughly independent of, United States district courts -- and Senate legislation (S. 2266, 95th Cong., 1st Sess. (1977)) -- which would have preserved courts of bankruptcy as fully adjunct units of the United States district courts. In 1977, the Judicial Conference, upon recommendation of a Special Ad Hoc Committee on Bankruptcy Legislation, thoroughly disapproved court reorganizational provisions contained in H.R. 8200 and approved (with recommendations for minor amendments) provisions contained in S. 2266. In 1977, the American Bar Association resolved, through its Board of Governors, that: "Separate bankruptcy courts, as provided for in H.R. 8200,... should not be established now."[8] The American College of Trial Lawyers opposed "the creation of separate specialized courts to handle bankruptcy cases", and also opposed "the significant increase in the number of Article III Federal judges which the creation of a specialized bankruptcy court would necessitate."[9] The Attorney General announced his conclusion that "the bankruptcy court should remain an adjunct to the district court" and that "needed reform can be implemented without the drastic step of creating Article III bankruptcy courts."[10] The National Bankruptcy Conference, the National Association of Bank Loan and Credit Officers, the Commercial Law League of America, and many bankruptcy practitioners strongly supported an Article III court structure.[11]

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[7] *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921).

[8] *Hearings on H.R. 8200 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 95th Cong., 1st Sess., at 4 (1977).

[9] *Id.*, at 8.

[10] *Id.*, at 216.

[11] *Id.*, at 76, 79, 189, 191, 199, 238 and 240.

Legislative Development of the Reform Act, 1977-1978

Both H.R. 8200 and S. 2266 were comprehensive proposals to reform substantive bankruptcy law and the procedures by which it was administered, as well as the "court structure" in which bankruptcy cases were then being resolved. Both bills were responses to extensive recommendations, which had been filed by a Congressionally created "Commission on the Bankruptcy Laws of the United States,"[12] after more than two full years of study, in July of 1973.[13] Part II of the Commission's Report consisted of a draft bill, which *inter alia* would have authorized an "Article I" court for resolution of bankruptcy law cases. Disagreeing with many elements contained in the "Commision's bill", the National Bankruptcy Conference (an "organization composed of... bankruptcy judges [and] full-time professors of law and practicing attorneys who specialize in [bankruptcy law]," consisting today of 58 full and 11 associate members)[14] prepared an alternative proposal, which became known as "the Judges bill".[15] Both proposals were studied in the Ninety-fourth Congress.

In the early months of the Ninety-fifth Congress, the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights commenced markup on a bill[16] which was reintroduced as H.R. 8200 on July 11, 1977, and ordered reported by the House Judiciary Committee on July 19, 1977. Due to a jurisdictional conflict with the House Ways and Means Committee, the bill was revised and again ordered reported by the Judiciary Committee on September 8, 1977.[17] Due in large part to disagreement over provisions in H.R. 8200 which would have established bankruptcy courts as fully independent courts of general jurisdiction under Article III of the Constitution, H.R. 8200 was first amended to substitute provisions which would have retained bankruptcy courts as units within the United States district court structure,[18] and later amended yet again to restore the "Article III court" structure before final passage on February 1, 1978.[19]

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[12] Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468.

[13] H.R. Doc. No. 93-137 (1973).

[14] See Statement of the National Bankruptcy Conference, submitted to the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary on July 22, 1982.

[15] See H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 2 (1977).

[16] H.R. 6, 95th Cong., 1st Sess. (1977).

[17] H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 3 (1977).

[18] 123 CONG. REC. H 11783 (daily ed. Oct. 28, 1977).

[19] 124 CONG. REC. H 478 (daily ed. Feb. 1, 1978).

In early September of 1978, the Senate passed H.R. 8200,[20] *after* substituting for the House-passed-text the text of S. 2266 as approved by the Senate Judiciary and Finance Committees.[21] The major element of difference between H.R. 8200, as passed by the House seven months earlier, and as passed by the Senate on September 7, 1978, was the manner in which bankruptcy courts were "structured". While both "versions" of the bill extensively amended the substantive and procedural laws of bankruptcy, the Senate-passed version preserved courts of bankruptcy as fully adjunct units in the United States district courts. In his remarks on the Senate floor on September 7, Senator Thurmond defined the basic issue of disagreement with the House-passed bill as a "court structure" issue rather than a "substantive law" issue:

> This legislation constitutes a monumental reform that is long overdue. The growth of consumer laws and the increased recognition by courts of the rights of consumers has underscored the need for a revision and modernization of our bankruptcy laws.
>
> S. 2266 represents a careful redrafting of the bankruptcy laws of this country. It recognizes the relationship between State laws on bankruptcy on the one hand, and the need for a certain amount of uniformity at the Federal level on the other. The approach taken by this bill is, in my opinion, for superior to the version now being considered by the House.
>
> Mr. President, as the ranking minority member of the Senate Judiciary Committee, I strongly support this legislation and urge its adoption.(22)

Enactment of the Reform Act

Following Senate passage, efforts to resolve the "court structure" differences between the House and Senate bills were undertaken by individual Members of both houses. In the final weeks of the Ninety-fifth Congress, confused and rushed efforts, marked by an inability to convene a meeting of conferees from both houses, ultimately produced a version of H.R. 8200 which:

(1) created a new "Article I" bankruptcy court system, consisting of units designated as "adjuncts" (or divisions) of district courts, scheduled to become fully operational on April 1, 1984;

(2) expressly authorized the exercise of newly expanded jurisdiction by then existing bankruptcy courts during a "transition period" commencing upon October 1, 1979 and ending on April 1, 1984; and

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[20] 124 CONG. REC. S 14745 (daily ed. Sep. 7, 1978).

[21] S. Rep. No. 95-989 (Judiciary Comm.) and S. Rep. No. 95-1106 (Finance Comm.), 95th Cong., 2d Sess. (1978).

[22] 124 CONG. REC. S 14722 (daily ed. Sep. 7, 1978).

(3) expressly provided -- for the duration of the "transition period" -- that each of those then existing bankruptcy courts ". . . shall constitute a separate department of the district court that is such court of bankruptcy under the Bankruptcy Act."(23)

Finally approved by both houses only nine days before adjournment of the Ninety-fifth Congress,[24] the "compromise" version of H.R. 8200 was forwarded to the President for approval. For the first time in its history, the Judicial Conference formally recommended a Presidential veto in a letter filed on October 24, 1978. On November 6 President Carter approved the Bankruptcy Reform Act of 1978.

Experience Under the Act, October 1979 - Present

On October 1, 1979 the bankruptcy courts commenced their experience as "separate departments" of the district courts under provisions in section 404(a) of the Reform Act:

> The courts of bankruptcy, as defined under section 1(10) of the Bankruptcy Act, created under section 2a of the Bankruptcy Act, and existing on September 30, 1979, shall continue through March 31, 1984, to be the courts of bankruptcy for the purposes of this Act and the amendments made by this Act. Each of the courts of bankruptcy so continued shall constitute a separate department of the district court that is such court of bankruptcy under the Bankruptcy Act.

Perceived deficiencies in clerical and supportive services for bankruptcy judges were corrected. New procedures for relieving bankruptcy judges of "purely administrative duties" were commenced. The expansion, or "consolidation" of jurisdiction, authorized by section 241(a) of the Reform Act, was implemented. In general, the value of the extensive substantive, procedural, and "structural" changes mandated by the Reform Act were rapidly realized and acknowledged. Not all of the consequences of the Reform Act were, however, regarded as welcome or positive developments.

Early in the Ninety-sixth Congress, cost consequences of the Act -- which had influenced the Judicial Conference's decision to recommend a Presidential veto -- became painfully apparent to the Appropriations Committees in both houses. Both committees, acting upon the Judiciary's appropriations authorization legislation for fiscal year 1980 (which commenced on October 1, 1979, the same day the "transition period" commenced), struggled to contain increases in expenditures related to changes "mandated" by the Act. With bankruptcy filings "exploding" during the past four years, that strain has remained central to processing budgets since 1980.

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[23] See sections 201(a), 404(a) and 405(b) of the Act.

[24] 124 CONG. REC. H 11047 (daily ed. Sep. 28, 1978), 124 CONG. REC. S 17403-434 and H 11864-66 (daily ed. Oct. 6, 1978).

In 1980 personnel compensation for the bankruptcy court system increased by forty-two percent (from $28.9 million in 1979 to $41.1 million in 1980) as a direct consequence of Reform Act requirements -- 215 law clerks, 92 mid-level management personnel for clerks offices, and reclassifications of secretarial and clerical personnel. Required court reporter services resulted in an increased expenditure of $1.7 million. Enhanced library facilities cost $2.5 million.

In 1981 cost increases were less directly related to requirements in the Reform Act, and more a reflection of increasing workloads and inflation. For instance, postage and telephone service costs increased to $5.6 million over the previous year cost of $3.8 million, and court reporter services cost an additional $1.4 million.

In 1982 cost increases again were largely workload-related. A $10.9 million increase in personnel compensation was largely a result of the addition of 333 permanent and 250 temporary positions for deputy clerks; and an increase of more than one-hundred percent in expenditures for equipment (from $1.6 million to $3.4 million) was attributable to the 583 new deputy clerks. A detailed profile of additional funds budgeted and expended as a result of the Reform Act is attached to this report as "Appendix A".

Of greatest significance, however, is the dramatic impact which the Reform Act and increasing caseloads have had upon the allocation of appropriated funds *within* the entire judicial branch budget. In 1979 less than five percent of the *growth* in the judicial branch's expenditures was attributable to the bankruptcy courts. In *each* year since 1980, more than twenty percent of the *growth* has been attributable to the bankruptcy courts -- and in 1981 more than *thirty-seven percent* of the growth was a cost of supporting the needs of the bankruptcy courts. A detailed profile of the cost percentages and figures by years from 1977-1982 is provided as "Appendix B" to this report.

In addition to the unwelcome, but unavoidable, cost consequences of the Reform Act, one other major consequence developed: apprehension over the validity of the exercise of adjudicatory authority -- the *jurisdictional* reach -- conferred upon bankruptcy court judges as a consequence of the "compromise" reached between the House and the Senate in the closing and confused days of the Ninety-fifth Congress. Recognized long before the compromise was adopted,[25] the abiguity inherent in the compromise arrangement embodied in section 241(a) of the Reform Act was an invitation to litigation -- and practitioners did not long delay accepting it. Less than six months after the Reform Act's effective date, the validity of the Act's "consolidation" of jurisdiction was contested in the United States Bankruptcy Court of Minnesota. Found invalid by the United States District Court upon appeal, the issue was finally resolved by the Supreme Court on June 28, 1982 in *Northern Pipeline*.

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[25] See H.R. Rep. No. 95-595, note 17 *supra*, at 23-39.

The Supreme Court Decision

At issue in *Northern Pipeline* was one central question:

> The question presented is whether the assignment by Congress to bankruptcy judges of the jurisdiction granted in §241(a) of the Bankruptcy Act of 1978, 28 U.S.C. §1471 (1976 ed., Supp. III) violates Art. III of the Constitution.(26)

As enacted by section 241(a),[27] section 1471 of Title 28, United States Code, provides:

> §1471. Jurisdiction
>
> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district court shall have original but not exclusive jurisdiction of *all civil proceedings arising under title 11 or arising in or related to cases under title 11.*
>
> (c) *The bankruptcy court* for the district in which a case under title 11 is commenced *shall exercise all of the jurisdiction conferred by this section on the district courts.*
>
> (d) Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.
>
> (e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all the property, wherever located, of the debtor, as of the commencement of such case. (empahsis added)

The *basic* issue was framed precisely by the language emphasized *supra*. Could the bankruptcy court, as a "department" of the district court, exercise *not only* jurisdiction to determine with finality questions of law arising "under title 11" (questions of *bankruptcy* law), *but also* questions of law that were joined in "all civil proceedings arising under title 11 or arising in or related to cases under title 11"?

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[26] 50 U.S.L.W. 4892, at 4893.

[27] See 92 Stat. 2668-69.

The purported "consolidation of jurisdiction," which was one purpose to have been served by the "Article-I-court-structure" compromise crafted in the closing days of the Ninety-fifth Congress, was put to the constitutional test. Could bankruptcy judges exercise the jurisdiction conferred upon them by section 241(a) of the 1978 Act if they were not serving as "Article III judges" -- judges having life tenure and absolute assurance that their salaries could not be "diminished during their continuance in office"? The Supreme Court held that they could not exercise such a broad grant of authority.

As noted above, the Court expressly stated that its judgment should not be applied retroactively, and also stayed its judgment until October 4, 1082 -- to "afford Congress an opportunity to reconstitute the bankruptcy courts *or* to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws."[28]

Thus, on June 28, 1982, the Supreme Court decision in *Northern Pipeline* placed before the Ninety-seventh Congress in its final weeks the very "problem" the Ninety-fifth Congress had allegedly "solved" in its final days.

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[28] See text at note 4, *supra* (emphasis added).

DEFINING THE PROBLEM

Within hours after announcement of the Supreme Court's decision in *Northern Pipeline*, House Judiciary Committee hearings were announced "on legislation to give bankruptcy judges the protections the Court held necessary...."[29] On April 20, 1982, one week before *Northern Pipeline* had been orally argued before the Supreme Court, the Chairman of the House Judiciary Committee had introduced a bill, H.R. 6109, "to provide for the appointment of United States bankruptcy judges under Article III of the Constitution, and for other purposes."[30] While not filing any remarks in the *Congressional Record* explaining the bill in April, Chairman Rodino explained at the opening of hearings on July 21, 1982 that he had introduced the bill "in anticipation of the possibility that the Supreme Court would hold the bankruptcy courts unconstitutional." In the same opening statement, he noted that the Court had stayed its judgment until October 4 and stated his belief that: "Congress must act by October 4, 1982 to prevent the bankruptcy system from collapsing". Most significantly, he explained that he had reached that conclusion because he interpreted the Court's opinion as follows:

> The Court held that *the* jurisdiction conferred on the bankruptcy court system by the Bankruptcy Reform Act of 1978 cannot be constitutionally exercised by those courts, because bankruptcy judges were not afforded the constitutional protections set forth in Article III to ensure judicial independence -- tenure during good behavior and guarantee against salary diminution while in office. (emphasis added)

Chairman Rodino's statement suggests that he interpreted the Court's decision as precluding the authorization of *all* jurisdiction conferred by section 241(a) of the 1978 Act, including jurisdiction of cases arising under the bankruptcy law contained in Title 11, *because* judges serving the reorganized bankruptcy courts were not holding commissions of office under Article III of the Constitution. We do not agree with that interpretation of the Court's opinion.

As previously noted in this report, the Judicial Conference's oversight authority, by statute, does not extend to the Supreme Court of the United States. The Supreme Court's unique standing under the Constitution, and its position at the apex of the Federal judiciary's structure, has always been recognized by the Conference. For sixty years the Conference has consciously refrained from commenting upon matters which might arise in a case or controversy before the Court, or upon matters of administrative concern to the Justices alone, if at all possible to do so. Certain issues, however, are both within the scope of the Conference's authority and the Court's jurisdiction. When considering issues which may impact upon lower-Federal courts' abilities to perform their functions, the Conference has consistently met its responsibility to comment, in spite of the possibility that the issues might later arise in a case or controversy before the Court. We do so in this instance. As we have often previously advised Congress, under no circumstances should the Conference's views be regarded as equivalent to comments on behalf of the Court or its Justices.

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[29] See *The Washington Post*, June 29, 1982, section D, at 6, col. 6 and at 8, col. 4.

[30] H.R. 6109, 97th Cong., 2d Sess. (1982).

In this specific instance, the Conference must, as have all other commentators, begin its analysis by interpreting the opinions filed in *Northern Pipeline*. Congress is now evaluating proposals presumably designed to remedy a defect in the Bankruptcy Reform Act of 1978 identified by the Court in that case. The solution to any problem begins by defining the problem. In this instance, the problem can only be defined by ascertaining what the Court *actually* held to be an invalid grant of jurisdiction. That is the scope of the defect.

Of necessity, we begin by noting that a multiplicity of views were reflected in a multiplicity of separate opinions. Justices Marshall, Blackman, and Stevens joined Justice Brennan in his opinion. Justice Powell and Chief Justice Burger joined Justice White in his opinion. The Chief Justice independently filed a separate opinion. Justice O'Connor joined Justice Rehnquist in his opinion. No *one* opinion was joined by *five* of the nine Justices. For purposes of this report, however -- and for purposes of corrective Congressional action -- the critical question can be reduced to: *how much* of the jurisdiction conferred upon the bankruptcy courts by section 241(a) of the Bankruptcy Reform Act of 1978 was *actually* found to be an unconstitutional grant of authority by a *majority* of the Justices?

We believe that Chairman Rodino's apparent conclusion that *all* jurisdiction conferred by section 241(a) was expressly held to be invalid is incorrect. We believe that reading Justice Brennan's opinion *in conjunction with* Justice Rehnquist's opinion inevitably requires a conclusion that the critical language is found in the last paragraph of Justice Rehnquist's opinion:

> I would, therefore, hold *so much* of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit over Marathon's objection to be violative of Art. III of the United States Constitution. Because I agree with the plurality that *this grant of authority is not readily severable from the remaining grant of authority to Bankruptcy Courts under §241(a)*, see *ante*, at 37, n. 40, *I concur in the judgment. . . .* (emphasis added)(31)

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[31] 50 U.S.L.W. 4892, at 4903.

Given that language, the conferral of jurisdiction in section 241(a) to decide actions at common law arising under state law -- and *only* that authority -- has *actually* been held to be unconstitutional by the Court. Further, given Justice Rehnquist's language, while other jurisdiction conferred by section 241(a) is not actually held to be unconstitutional, the exercise of such authority is impaired *only* by virtue of the impossibility of severing that which clearly is invalid. We believe that the impossibility of severance is the real problem of the moment. We believe that statutory ambiguity -- *not* the manner in which the 1978 Act *structures* the bankruptcy courts -- is the defect which should be remedied now. We believe that factor motivated the stay of judgment until October 4. We believe the compelling problem facing Congress now is most accurately defined by that interpretation, and that a reasonable remedy is patently obvious: clarification of the section 241(a) grant of jurisdiction.

We are compelled to emphasize the basic fact that a majority of the Justices did not hold unconstitutional *all* of the jurisdiction conferred by section 241(a) *because* judges serving the reorganized bankruptcy courts are not Article III judges. *Five* Justices did *not* expressly or impliedly find that the exercise of jurisdiction to resolve questions of law arising "under title 11" -- questions of *bankruptcy* law -- by the existing bankruptcy judges was unconstitutional. Literally all witnesses testifying before the House and Senate Judiciary Committees in July acknowledged that reality -- even those witnesses who ardently advocated reconstituting bankruptcy courts as fully independent parallel courts of general jurisdiction equivalent to the district courts. The President of the Commercial Law League of America, which has supported a fully independent parallel court structure since at least 1977, stated "the problem" with precision in House hearings on July 21:

> Mr. Chairman, *that* is the issue, i.e., what is the jurisdiction of bankruptcy courts. *Not* whether bankruptcy courts and their judges should be upgraded to Article Three status.(32)

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32 See Prepared Statement of Joseph E. Friend, Esq., submitted during Hearings before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, July 21, 1982.

A SYSTEMIC CONTEXT FOR EVALUATING "RESTRUCTURING" PROPOSALS

Given that definition of "the problem", a choice of possible remedies is relatively limited -- (1) respond precisely by clarifying the grant of jurisdictional authority contained in section 241(a) of the 1978 Act; or (2) respond by reconstituting bankruptcy courts as "general jurisdiction courts" equivalent to United States district courts. The Judicial Conference recommends clarification of section 241(a) for reasons which will be stated in greater detail later in this report. Before presenting those reasons in detail, however, we believe Members may find valuable an explanation of the context in which the Conference has assessed "the problem" and its possible remedies.

While much has changed in the past five years, the Judicial Conference's "context for evaluation" of the issue now before this Ninety-seventh Congress remains the same context in which issues framed during consideration of the far more comprehensive Bankruptcy Reform Act of 1978 were evaluated in 1977. Although the spectrum of issues has "narrowed", the Judicial Conference's statutory and inherent responsibility to promote the effective and efficient administration of business in *all* Federal courts below the Supreme Court will not permit evaluation in the narrow context of the bankruptcy courts alone. They are only one element in the Federal judicial system.

All elements in that system serve the public in essentially the same way: they use resources available to them to do the work placed before them. The extent to which they serve the public well is a reflection of the resources which are actually available and how they are allocated to do the work. In every Federal court workload is an *indirect* consequence of jurisdiction. Jurisdiction conferred upon a court or a unit within it -- such as the United States district courts' magistrates system and the adjunct bankruptcy court system -- *directly* determines what types of cases may be resolved in that court or unit. *Caseloads*, however, do *not* reflect *workloads*, because certain types of cases require more time to resolve than others. The Federal judiciary and the Congress have long recognized that reality. In authorizing judicial positions of *every* type in the past two decades, Congress has deliberately and carefully probed beyond *caseload* data to examine actual *workload* situations.

Congress has examined workload with increasing attention because Congress is ultimately responsible for providing the resources needed to do the work. In the past two decades the *workload* at all levels of the Federal court structure has "exploded". It has grown far faster than the resources available to process it. The resources are nothing more than workers -- judges and supporting personnel -- and equipment they must have to do their work. People and their equipment are available only if Congress authorizes the positions for people to fill and appropriated funds for their remuneration and the provision of their equipment.

The Judicial Conference is as aware as are Members of Congress of the current strain involving resources -- the absolute need to not only limit increases in authorized appropriations, but to also reduce them -- which is now the central focus of national concern. The Conference's Budget Committee is responsible for preparing the appropriations submissions filed for each fiscal year with the Office of Management and Budget and the Appropriations Committees in the House and Senate for all courts other than the Supreme Court. While the total *judicial* budget did not exceed *one-tenth of one percent* of the entire *Federal* budget from 1940, when Congress began processing it separately, to 1980, it has nevertheless easily "kept pace" with the growth in Federal spending. See "Appendix C" to this report.

The Conference has long recognized its obligation to seek from Congress only those resources which are absolutely essential. It has also continuously worked to insure the maximum degree of "return on the taxpayers' dollars" by: (1) encouraging courts and their supporting units to develop and utilize efficient processes and procedures; and (2) encouraging Congress to carefully assess the *workload* consequences of proposals to revise or *expand* jurisdiction at any level of the Federal judicial system. The correlation between increases in workload at the basic level of the Federal judicial system -- the United States district courts -- and consequential increases in other units in the system has long been acknowledged by the Judiciary and Appropriations Committees in both the House and the Senate. The balancing of work and resources -- and the resource allocation problems confronting the judiciary are not unknown to Congress.

In that "systemic context" -- one of assessing the impact upon the *entire* Federal judicial system -- not only a single element of that system -- the Conference has consistently evaluated proposals for "restructuring" courts by asking three fundamental questions. In early 1977, when legislative proposals to establish the bankruptcy courts as fully independent trial courts of general jurisdiction equivalent to the district courts were first evaluated, we framed those three questions as follows:

> 1. What modifications are warranted in the structure of the Federal judicial system to effectively resolve cases involving *substantive bankruptcy law*?
>
> 2. What resource allocation consequences are associated with the proposed modifications?
>
> 3. What are the probable economic consequences, in terms of increases in Federal appropriations, of proposed modifications?

We firmly believe the answers to those questions are as relevant now as they were five years ago.

What modifications are warranted in the structure of the Federal judicial system to effectively resolve cases involving substantive bankruptcy law issues?

Now, as in 1977, we have attempted to evaluate the first of the three questions without losing sight of the real work performed by bankruptcy courts - the resolution of substantive *bankruptcy law* questions and the application of substantive and procedural *bankruptcy law* provisions. Structural modifications contained in H.R. 8200 in 1977, and in proposals now being considered, derive from efforts to statutorily establish existing units within the Federal judicial system which are responsible for resolving cases arising *under the bankruptcy laws* of the United States as thoroughly independent courts of *general* jurisdiction -- courts exercising a full range of jurisprudential authority over *any and all causes of action cognizable under Article III of the Constitution.* Today those units are "separate departments" of the ninety-four district courts which, in the aggregate, constitute the basic foundation of the Federal judicial structure. As "separate departments" those units have contributed enormously to the district courts' ability to effectively and expeditiously perform the one function which is essential -- the resolution of individual cases which must be adjudicated before a Federal trial court. In conjunction with the creative and constructive utilization of the magistrates system which Congress has authorized within the past two decades, adjunct bankruptcy courts, regardless of their label -- or "status" -- have helped the Federal judicial structure survive the explosion in Federal litigation with relatively minimal increases in *district* court judicial positions and supporting personnel. What factors would justify changing an arrangement which has worked well?

Proponents of "separate general jurisdiction court" proposals were convinced in 1977 and 1978 that the bankruptcy courts could not efficiently and effectively do their work as adjunct units, or as "separate departments", in the district courts for many reasons. They fully disagreed with the Conference's belief that adjunct units worked well. Many of the reasons then cited for that viewpoint are no longer extant; the 1978 Act remedied them, as we have previously noted in this report, with large consequential increases in expenditures.[33]

Only *one* of those reasons is relevant today. The Supreme Court's action in *Northern Pipeline* has resurrected its relevancy. Significantly, however, it is now the *sole* justification for current "restructuring" proposals, and may therefore be examined without other factors distracting from its evaluation.

Proponents of restructuring proposals as a remedy to the jurisdictional problem created by *Northern Pipeline* allege that bankruptcy courts cannot efficiently and effectively do their work *unless* they have a grant of *general jurisdiction* equivalent to Article III courts -- *because* so much of their work involves the resolution of legal questions involving state common law or Federal question issues. When such issues arise they must be resolved before the

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[33] See page 8, *supra*, and Appendices A & B.

bankruptcy law issues in the case can be resolved. If the bankruptcy judge does not have the authority -- the jurisdiction -- to resolve those "ancillary" issues, the final resolution of the *bankruptcy* issues will be delayed while a court with jurisdiction -- a state court or a United States district court -- resolves the "ancillary" issues.

Because the 1978 Act conferred the jurisdiction in bankruptcy courts to resolve such "ancillary" issues in that language which has now been held unconstitutional in the *Northern Pipeline* decision, we now have some idea of how much of their work since October 1, 1979 has involved ancillary issue resolution. The following two tables together reveal that *less than five percent* of the *caseload* in the bankruptcy courts during the transition period which commenced on October 1, 1979, have involved the resolution of state and Federal "ancillary" issues:

Table 1
Total Cases Filed in U.S. Bankruptcy Courts
Showing Percentage of Ancillary Cases

Year Ended June 30	Total	Bank-ruptcy	Adver-sary	Ancillary Only[1]	
				Number	Percent Ancillary of Total Cases Filed
1980[2] ...	242,345	210,364	31,981	4,800	2.0
1981	454,961	360,329	94,632	14,195	3.1
1982	506,829	367,866	138,963	20,840	4.1
1983[3] ...	519,000	355,000	164,000	25,000	4.8

[1] Estimated at 15 percent of total adversary proceedings and rounded.

[2] Excludes 67,517 cases filed under the Bankruptcy Act (rather than the 1978 Reform Act) for the months of July-September 1979.

[3] Estimated.

Table 2
Adversary Proceedings Filed in
U.S. Bankruptcy Courts
Showing Types of Ancillary Cases

Year Ended June 30	Adversary Proceedings	Ancillary[1]	State Courts	U.S. District Courts[2]
1980[3]	31,981	4,800	4,580	220
1981	94,632	14,195	13,555	640
1982	138,963	20,840	19,900	940
1983[4]	164,000	25,000	23,900	1,100

[1] Estimated at 15 percent of total adversary proceedings and rounded.
[2] Estimate based on 4.5 percent of total ancillary cases and rounded.
[3] Nine months October 1979-June 1980.
[4] Preliminary estimates.

Several comments concerning the data displayed in the two preceding tables are necessary. As noted above, *caseload* figures are *not* equivalent to *workload* figures. The figures shown in the tables are not intended to suggest an equivalence. They are, however, a measure of how many *cases* arising in bankruptcy courts potentially and actually have involved "ancillary" issues.

In materials submitted to the House and Senate Judiciary Committees recently, the distinction between "adversary proceedings" and "ancillary issues" has frequently been ignored. Theoretically, *every* adversary proceeding *might* require resolution of an ancillary issue involving state common law or Federal question law. Realistically, approximately fifteen percent of the adversary proceedings in the transition period *have* involved the resolution of ancillary issues. Even if a far larger percentage were to develop, the fundamental conclusion remains inescapable: the overwhelming majority of the *work* in the bankruptcy courts remains *bankruptcy law* work -- the resolution of issues involving *bankruptcy law* -- not state common law or Federal question law. Recognizing that "ancillary cases" frequently do involve more work than the other adversary cases, and that all of the adversary cases involve more work than a "routine" bankruptcy case -- which now often involves little personal judicial attention beyond the discharge hearing, now frequently being conducted *en masse,* as are naturalization proceedings --

does not alter the basic reality. The bankruptcy courts are still essentially courts in which *bankruptcy law* work is the work for which resources are being allocated.

We believe that basic reality should be emphasized, because we believe that equating "adversary proceedings" and "ancillary issue cases" leads, understandably, to an erroneous conclusion that *Northern Pipeline* will have a far greater quantitative consequence than it will have in fact. On July 18 and 19, 1982 Bankruptcy Judge Dean M. Gandy, of the United States Bankruptcy Court in the Northern District of Texas filed, as an exhibit accompanying letters to House Judiciary Committee Chairman Rodino and Senator Robert Dole, a listing of:

> . . . the disputed matters that were set in my court during May and June, 1982. Of those matters, at least 183, or 86%, represented, to some extent, a determination of private rights created by the state as defined by Justice Brennan.

Without challenging the accuracy of Judge Gandy's *characterization* of the matters on that list, we are apprehensive that, if his characterization is interpreted as a portrayal of the percentage of "matters" before bankruptcy judges which *will* be effected by the Court's *holding* in *Northern Pipeline*, that misinterpretation will dramatically distort the real quantitative consequences of the decision's invalidation of state law "ancillary" jurisdiction. Included in this report as "Appendix D" is a copy of Judge Gandy's exhibit and our analysis of the "matters" listed in a column labeled "Art. III Judge Possibly Required". We do not believe most are effected by the Supreme Court's *holding* in *Northern Pipeline;* we believe that no more than *twenty-five* percent of the "matters" listed might *potentially* be effected by the *Northern Pipeline* holding.

Our assessment of bankruptcy court workloads during the transition period has reconfirmed our conclusion in 1977 -- that modifications in court structure that would add another 94 courts to the existing 111 below the Supreme Court are simply not warranted, certainly not by the single remaining purported reason for them -- the need to "consolidate jurisdiction in one court". We cannot believe that the establishment of 94 independent general jurisdiction trial courts is warranted by the fact that final resolution of a bankruptcy law question *may* be delayed in 25,000 among 519,000 bankruptcy cases. The proposed "restructuring" is not even warranted by the mere *possibility* of delay in all 25,000 "ancillary cases" among the 164,000 "adversary cases". Doubling the number of general jurisdiction courts in the system to accommodate a possible delay in final resolution of a minority of bankruptcy cases is not justifiable.

What resource allocation consequences are associated with the proposed modifications?

Since the Judiciary Act of 1789[34] the district courts of the United States have served the nation well as the "single trial court of general jurisdiction". As their number increased the need to "filter" appeals from their final decisions to the Supreme Court of the United States was recognized, and the Congress responded in 1891 with the Circuit Court of Appeals Act.[35] That "three tier" Federal judicial structure has worked well, and has been a model for state and local court reform. Thirty-two states have adopted that model, and the eighteen which have not do not yet need an intermediate appellate court. A comprehensive study by the American Bar Association supports the concept that a unified trial court is essential to a sound judicial system and that "specialization should be achieved within the framework of a single trial court."[36]

There are sound reasons for preserving a single general jurisdiction court, with special units to process special types of work. If the last 200 years of experience have proven nothing else, they have proven that the proliferation of "forums" for resolution of cases encourages the filing of larger numbers of cases, conflicts between and among decisions rendered, and appeals to resolve the conflicts. All past and present proposals to reconstitute bankruptcy courts as general jurisdiction trial courts would have at least one inevitable result: the number of forums would increase. Assuming extensive "concurrent jurisdiction" -- which is really *the* purpose served by "consolidating jurisdiction" over "ancillary cases" in the bankruptcy courts -- jurisdictional conflicts will arise. Supporters of "restructuring" proposals argue that clarifying jurisdiction in district courts for the resolution of "ancillary issues" arising in the bankruptcy courts will yield litigation over jurisdiction. It probably will. Some of it will be necessary, and some of it will not be; lawyers can always render that which is simple complex. *Two general jurisdiction courts,* however, will also invite litigation over jurisdiction. In addition, two general jurisdiction courts will generate more appeals for the intermediate appellate courts as well. Creating more work will ultimately strain resources and create delays at all levels in the system. A proposal purportedly of value because it would eliminate delay in a small percentage of bankruptcy cases will eventually generate delay in a larger number of all cases.

All proposals for restructuring the bankruptcy courts as general jurisdiction trial courts entail the conferral of life tenure upon bankruptcy court judges. Once appointed to office the incumbent is entitled to remain unless impeached. The number of judges serving the bankruptcy courts, and all other courts below the Supreme Court, is a direct reflection of the quantity of work before the courts. Experience has demonstrated that bankruptcy court filings fluctuate rather unpredictably in response to economic conditions (See "Appendix E" to this report), and Congress has for more than twenty years worked closely with the Judicial Conference to limit additional Article III judicial positions to only the number of positions critically needed. Congress has properly insisted that each new position be justified upon the basis of well-documented *consistent* and *established* workload levels. The Conference has fully cooperated with those Congressional efforts because institutional growth -- even when absolutely necessary -- generates resource allocation problems and confusion which interfere with the efficient management of the courts' business.

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[34] Act of Sept. 24, 1789, 1 Stat. 73.

[35] Act of March 3, 1891, 26 Stat. 826.
See ABA Standards Relating to Court Organization.

[36] §§1.10, 1.11(b), 1.12(b), and Commentary.

Proponents of restructuring the bankruptcy courts concede that fluctuating caseloads in those courts mitigate against life-tenured judicial positions for those courts. They cite as a compensating factor, however, the value of a standing repository or "pool" of Article III trial court judges who will be able to assist other Federal courts when work in the bankruptcy courts recedes. Should that eventuality develop, will the contribution from such "visiting judge" activity be adequate for more than brief temporary periods? Will Congress, which has frequently questioned extensive "visiting" activity, conclude that the "temporary services" rendered are really worth the associated costs in supporting expenditures? Will the bar in a locality welcome a parade of "unknown personalities"? Will the "visiting judge" travel with a full staff? If not, then what will that staff do at his resident situs during his visiting service? Will the "visiting judge's" staff requirements at the visited court be provided by temporary employees? How many "temporary" offices will be needed, and what will be the costs for leased commercial space? In summary, will the alleged service be an *efficient* allocation of resources? We do not believe that it will be.

What are the probably economic consequences, in terms of increases in Federal appropriations, of proposed modifications?

We have noted several sources of "unpredictable" cost increases *supra*. Because predictable increases in costs are addressed in detail in this report's examination of a specific "restructuring" proposal, *infra*, we will only observe here that, inevitably, there will be a certain level of increase in expenditures regardless of specific elements embodied in the restructuring legislation. Given the extent to which appropriated funds have already been expended for the bankruptcy courts in the past four years, the probable economic consequences will not be as great as those associated with earlier "restructuring" proposals in 1977 and 1978. There will, however, be inevitable increases in the expenditure of appropriated funds for a function -- the resolution of bankruptcy law cases -- which is now being adequately performed. We do not believe those increases in expenditures are justifiable.

CHOOSING A REMEDY

Proposals concerning court "structure" and "jurisdiction" are often presented as complex and mysterious subjects, fraught with factors beyond the comprehension of those who are not routinely working in the courts or litigating in them. While legal issues often are complex -- and too often are deliberately rendered more complex than necessary by participating lawyers and judges -- evaluating the choices for a remedy to the *Northern Pipeline* "problem" need not be a complex exercise. Witnesses appearing during House and Senate hearings in July generally suggested that only two viable "choices" for remedial action by Congress exist -- the two suggested by the language in the Court's announcement of the stay of judgment: (1) reconstitution or "restructuring" of the bankruptcy courts; and (2) "adoption of other valid means of adjudication", or clarification of jurisdictional authority conferred by section 241(a) of the 1978 Act.

Before discussing specific proposals which would implement either a "restructuring" remedy or a "jurisdictional clarification" remedy, we should briefly discuss a related question raised by several witnesses in July: what if Congress is unable to act by October 4? On July 22, 1982 the General Counsel for the Administrative Office of the U. S. Courts, in response to the Director's request for an analysis of the consequences of an absence of action by Congress, provided a memorandum in which he concluded that provisions in the 1978 Act which were *not* impaired by *Northern Pipeline* would permit the continuing conduct of bankruptcy court business without extensive disruptive consequences after October 4. The full text of the General Counsel's memorandum is provided as "Appendix F" to this report. While concluding that that analysis is accurate, the Conference has also concluded that Congressional reliance upon it would not be as desirable as positive remedial action to *definitively* clarify jurisdictional ambiguities. A measure of uncertainty has been ingendered by *Northern Pipeline* in the business community, as well as in the legal community.[37] A definitive response to public perceptions that "the system will collapse" is necessary, if at all possible. As previously noted in this report, the Judicial Conference recommends that Congress approve legislation to clarify bankruptcy court jurisdiction, through amendments to section 241(a) of the 1978 Act. Presently, however, legislation is pending in the House of Representatives which would implement a "restructuring" remedy, and the Conference has been asked to provide Congress with its views on that specific proposal.

H.R. 6978, 97th Cong., 2d Sess. (1982)

Following hearings before the House Judiciary Committee's Subcommittee on Monopolies and Commercial Law on July 21 and 22, on a bill, H.R. 6109, discussed

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[37] *See e.g.* N. Y. Times, July 13, 1982, §D, at 2, col. 1, and *Business Action Network: Washington Watch*, Aug. 1982, Vol. IV, No. 8, at 12.

supra, the subcommittee drafted a "clean bill". Introduced on Thursday, August 12,[38] that bill, H.R. 6978, was scheduled for subcommittee markup on Tuesday, August 17. Approved that day by the subcommittee, the bill was scheduled for markup by the House Judiciary Committee forty-eight hours later, on August 19. On August 19 the House Judiciary Committee approved the bill by voice vote, after adopting amendments, and ordered the bill reported.[39]

As reported, Section 2 of H.R. 6978 amends Title 28 of the United States Code by adding a new "Chapter 6 - Bankruptcy Courts" which:

1. Authorizes ninety-four new general jurisdiction trial courts, one in each Federal judicial district (§151);

2. Requires Presidential appointment, by and with Senate advice and consent, of 227 judges to the newly created 94 courts (§152);

3. Provides that the 227 judicial positions shall be life-tenured positions (§153);

4. Establishes the salary of office for each judicial position at an annual rate of $65,000 (§154);

5. Provides for the designation of a chief judge in each new court, administration of business by court rules and orders, and the designation of places and times at which court shall be held by court rule (§§155-157);

6. Requires the continuance of "all pending process, pleadings, and proceedings" before a judge if his office becomes vacant until that office is filled by appointment or a judge is designated to do the work (§158); and

7. Authorizes, subject to the discretion of the circuit council for the judicial circuit in which a bankruptcy court is located [See 28 U.S.C. §332], appeals from judgments, orders, and decrees of a single bankruptcy judge to panels of three such judges (§159).

In districts in which three-bankruptcy-judge panels are established under the new section 159 of Title 28 appeals from those panels *shall* go directly to the courts of appeals, or *by consent of the parties* appeals from judgments, orders, and decrees of a single bankruptcy judge *may* go directly to the courts of appeals, without being reviewed by such a panel first. In districts in which the three-bankruptcy-judge panels are *not* established, all appeals shall go directly to the courts of appeals (See section 28 of the reported bill).

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[38] 128 CONG. REC. H 5884 (daily ed. Aug. 12, 1982).

[39] 128 CONG. REC. D 1124 (daily ed. Aug. 19, 1982).

The reported bill also provides for the designation and assignment of circuit and district court judges to serve as bankruptcy court judges, for bankruptcy court judges to serve as district court judges nationwide, for bankruptcy court judges in "active service status" to serve as courts of appeals judges *in the judicial circuit in which they sit* as bankruptcy court judges, and for "retired" bankruptcy court judges to serve as both district and courts of appeals judges *nationwide.* (Sections 3-8 of the reported bill).

Under Section 41 of the reported bill, bankruptcy court judges are authorized to issue writs of habeas corpus.

In addition to many "technical amendments" to Title 28, the reported bill includes provisions which would (1) provide increased bankruptcy judge representation on the Federal Judicial Center Board (Section 23); (2) "convert" existing district court judge positions on judicial councils of the circuits to bankruptcy judge positions (Section 10); (3) add twelve bankruptcy judge members to the present twenty-six-member Judicial Conference (Section 9); and (4) confer upon bankruptcy court judges appointed by the President to the newly established courts full salary-of-office retirement benefits provided under 28 U.S.C. §371 (Section 11 and Section 15).

The reported bill also authorizes a full supporting staff structure for the bankruptcy courts equivalent to the supporting personnel structure presently serving United States district courts (Section 26).

All provisions in the bill become effective upon enactment, *except* those provisions which: (1) actually establish the new court (§151(a) of Title 28, as amended); (2) establish the judicial positions as life-tenured positions (§153 of Title 28, as amended); (3) authorize a judicial salary rate of $65,000 per year for those positions (§154 of Title 28, as amended); and (4) authorize establishment of the three-bankruptcy-judge appellate panels (§159 of Title 28, as amended). Those four provisions will become effective on April 1, 1983 (Section 53).

Finally, one remaining section in the bill deserves review. Section 14 of the reported bill adds a new section 377 to Title 28 to provide a special retirement program for those bankruptcy judges now in office who remain in office until March 31, 1983, having then served in office for at least ten years, who notify the President in writing by January 1, 1983 of their willingness to accept an appointment to a newly created bankruptcy court on or after April 1, 1983. Those presently serving bankruptcy judges who do not receive appointments to a newly created bankruptcy court are authorized, under proposed section 377, to elect, in lieu of an annuity under provisions in the Civil Service Retirement System, an annuity, payable after age 60 at a rate equal to "the rate of salary payable" on March 31, 1983, multiplied by the sum of (1) the number of years served before October 1, 1979 divided by 28 and (2) the number of years served after September 30, 1979 divided by 14. At present, "the rate of salary payable" to a bankruptcy judge is $58,500 annually. If that figure remains unaltered until March 31, 1983, the "computation formula" for an annuity under the new section 377 of Title 28 will be mathmatically presented as:

$$\$58{,}500 \quad \times \quad \left(\frac{\text{Years of service before Oct. 1, 1979}}{28} \quad + \quad \frac{\text{Years of service after Sep. 30, 1979}}{14} \right)$$

Yet another way to express the "computation formula" is: 3.57 percent of $58,500 for each year of service before October 1, 1979 and 7.14 percent of $58,500 for each year of service thereafter. A bankruptcy judge with exactly the ten years of minimally required service on March 31, 1983 would be paid, after attaining age 60, an annuity of $29,250, precisely fifty percent of "the rate of salary payable". A bankruptcy judge with 24 years of service on March 31, 1983 would be paid, after attaining age 60, one-hundred percent of "the rate of salary payable". By express provision, each such annuity will be increased to the same extent that the salary of office for a new bankruptcy judgeship is increased in the future.

Judicial Conference Views

The Judicial Conference does not recommend favorable Congressional action on H.R. 6978. Our established policy position disapproving proposals which would convert bankruptcy courts from divisions of district courts into independent trial courts of general jurisdiction under Article III of the Constitution, adopted in March of 1977 and reaffirmed continuously thereafter, most recently on August 30, is fully applicable to H.R. 6978. In the past eleven weeks, evaluations of H.R. 6109, a predecessor bill to H.R. 6978, were made by three Conference committees,[40] all of which recommended disapproval of that bill. Recommendations prepared by those committees are fully applicable to H.R. 6978, and were reviewed in conjunction with that bill on August 30 by the Executive Committee. The Executive Committee unanimously agreed with those recommendations.

Having evaluated H.R. 6978 in the "systemic context" previously discussed in this report,[41] the Conference has concluded that:

1. Modifications of the Federal judicial system which would be made by H.R. 6978 are not warranted in order to effectively resolve *bankruptcy law* cases.

2. Resource allocation consequences associated with the proposed modifications in H.R. 6978 would be extensive and pervasively disruptive of the efficient system-wide management of judicial branch business.

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[40] See page 2, *supra*.

[41] See pages 14-21, *supra*.

3. Unavoidably consequential increases in expenditures of appropriated funds -- estimated at $41 million in the first year and a minimum of $33 million in each year thereafter -- are thoroughly unjustifiable.

In previous pages of this report we have explained why we do not believe the resolution of substantive *bankruptcy law* questions warrants increasing the number of courts in the Federal judicial system below the Supreme Court from 111 to 205. We have also explained why we believe *doubling* the number of general jurisdiction trial courts in the system, and increasing the number of Article III trial judge positions by a factor of *forty-four* percent (from 514 to 741), is not warranted to avoid a degree of delay in the resolution of cases which have constituted only *five percent* of the total caseload in the bankruptcy courts in the past three years. We note that H.R. 6978 expressly creates 227 new Article III trial court judgeships. Studies completed this year, however, document the need for more than 300 judicial positions in the bankruptcy courts. One such study has already been made available to the House Judiciary Committee.[42] Even if Congress waits until next year to create the additional 70 to 80 needed bankruptcy judge positions, if they are created as Article III general jurisdiction trial court positions, the number of those positions will be increased by a factor of 59 percent (from 514 to 817) within *one* year, *assuming* needed additional district court positions are *not* created.

We have noted, *supra*, the "ripple effect" consequences of additional forums for dispute, resulting conflicts, and resulting appeals.[43] The consequences to the *entire* Federal judicial system can be summarized in one phrase: "thoroughly unjustified growth". Under the "appeals provisions" in H.R. 6978, caseloads at the court of appeals level will inevitably increase -- and there is literally no way to predict *how much* they will increase in order to plan for the resources which the judiciary will have to seek from the Congress.

Provisions in H.R. 6978 authorizing the new general jurisdiction judges to serve other courts in the system should be assessed in light of our observations earlier in this report concerning the relative value of such service compared to the consequential costs associated with it.[44]

"Appendix G" to this report is a cost estimate for H.R. 6978 prepared by the Administrative Office. In three separate tables, sources of increases in appropriated amounts are explained in detail. Those tables do not require extensive explanation. Costs associated with converting *each* judgeship position from its present "Article I status" to the proposed "Article III status" are presented in Table 1. Consequential costs associated with staff, facilities, "senior status" provisions, and retirement provisions are presented in Table 2. Total consequential costs for H.R. 6978, *as reported* (227 new judgeships), and if amended to provide 300 new judgeships, are presented in Table 3.

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[42] See 128 CONG. REC. H 5872 (daily ed. Aug. 12, 1982)

[43] See page 20, *supra*.

[44] See page 21, *supra*.

A Recommended Alternative Remedy

Attached to this report as "Appendix H" is a draft bill which the Judicial Conference submits for consideration and recommends as a fully adequate remedy to the *holding* in *Northern Pipeline.*[45] That legislation will clarify the ambiguity in the 1978 Act which is a consequence of (1) the jurisdiction conferred by section 241(a) to decide common law actions arising under state law having been held invalid, and (2) the impossibility of severing *that* jurisdiction from other jurisdiction conferred by section 241(a). As noted in our early examination of "the problem,"[46] we believe the statutory ambiguity is *the defect* which should be remedied before October 4. We believe the draft bill contained in "Appendix H" will remedy *that defect.*

In very direct language, the draft bill amends section 241(a) of the 1978 Act by providing a revised section 1471 of Title 28 which expressly vests jurisdiction over bankruptcy cases under Title 11 and all "subsidiary proceedings" -- proceedings based upon a claim under a provision of Title 11 which could not have been brought by any person in the absence of the commencement of a case under Title 11 -- within the jurisdiction of the bankruptcy court for the district. Jurisdiction over "related proceedings" -- those based on a claim under a statute of the United States other than Title 11 which are necessary to the determination of a claim under Title 11 -- is *clearly* conferred upon the district court.

Revised section 1471(f) expressly provides authorization for the district court to designate any bankruptcy judge as a special master, and revised section 1471(c) expressly provides authorization for the referral to a United States magistrate of any bankrutpcy law or "ancillary" issue. As part of "Appendix H" we have provided a "section-by-section" analysis of the draft bill's provisions.

We recommend this approach because we believe it will work well and work quickly. The compelling need of the moment is that of drawing clarity from confusion. We believe our recommended legislative remedy will meet that need. It will *not* require another "transition period", during which the system will be "shadowed" by questions of possible constitutional inadequacies, which several witnesses have suggested *any* restructuring proposal will raise.

The approach we recommend *will* permit *one* court of general trial jurisdiction in each judicial district to "manage" the resources available in that judicial district *flexibly*. When special attention is demanded for a particular "case" or "proceeding," the United States district court will be able to use all available resources to provide the attention needed.

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[45] See pages 12-13, *supra*.

[46] *Id.*

While our recommended remedy for "the problem" does not address matters such as retirement benefits and court reporters -- matters we believe deserve Congressional attention when time will permit -- it does provide a decisive and immediately workable approach to clarifying the questions ingendered by the *Northern Pipeline* holding -- and we believe it will bring order to the "chaos" perceived to exist in the legal and business communities. As one witness noted in July:

> . . . Congress must stop losing sleep over the economic and social status of 220 bankruptcy judges and start to worry about the constitutional rights of 200 million American citizens.(47)

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[47] See Prepared Statement of Thomas G. Krattenmaker, submitted to the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary on July 21, 1982.

RELEVANT PUBLIC POLICY FACTORS

In previous sections this report has traced the four to five year history of proposals to establish bankruptcy courts as independent trial courts of general jurisdiction under Article III of the Constitution fully equivalent to the United States district courts which have been the foundation of the Federal judicial system since 1789.[48] We have noted that five years ago proponents cited multiple reasons to justify such proposals, most of which were founded upon a perceived need to "upgrade" bankruptcy courts and the personnel serving those courts -- and we have noted that most of those objectives have been achieved.[49]

Proponents now almost uniformly cite only *one* reason for establishing bankruptcy courts as "independent Article III trial courts" -- a perceived need to "consolidate jurisdiction" over "ancillary issue resolution" in one "tribunal". As previously stated,[50] the rationale for the needed "consolidation" consists of: (1) much of the bankruptcy courts' work involves the resolution of legal questions involving state common law or Federal law questions; (2) when such issues arise they must be resolved before the bankruptcy law issues in the case can be resolved; (3) if "consolidated jurisdiction" is not available, there will be costly delays while another court resolves the ancillary issue; and (4) during the delay the assets of the estate are dissipated. One bankruptcy practitioner summarized the problem precisely in his testimony before the House Judiciary Committee on July 21, 1982:

> Simply stated, the jurisdictional hodge podge which existed under the Bankruptcy Act [prior to October 1, 1979] was costing institutional creditors money.(51)

That aspect of this issue raises policy factors for Congressional attention which we have not considered in our "systemic context" analysis.

The Judicial Conference does *not* dispute the rationale presented *supra*. There is no question that a lack of "consolidated jurisdiction" has in the past resulted in delay, and that such delay has contributed to dissipation of assets. While available data does not support a conclusion that a "large" percentage of cases, in terms of all "adversary proceedings", is involved,[52] we recognize that individual "large" cases -- usually business failure and reorganization cases -- involving large amounts of money are frequently the cases in which the delays do arise. We are not insensitive to the problem. We merely believe that it must be confronted in the context of its place within the *entire* judicial system.

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[48] See pages 4-7, 11 and 16-19, *supra*.

[49] See pages 7-8, *supra*, and Appendices A and B.

[50] See pages 16-19, *supra*.

[51] See Prepared Statement of Herbert P. Minkel, Jr., submitted to the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary on July 21, 1982.

[52] See pages 17-19, *supra*.

Those who recommend independent Article III general jurisdiction bankruptcy courts as the remedy to that problem are really advocating a very expensive public institutional solution -- a fundamental revolution in the nature of the Third Branch of Government in response to one special concern. For almost 200 years *all* civil litigants in the Federal system have turned to the district courts for resolution of cognizable issues. In the past two decades classes of litigants have sought -- and obtained -- priority status for those causes of action of special interest to them. Now legislation to abolish that network of "civil priorities" which has developed has wide support in the Congress. The Judicial Conference supports H.R. 4396, presently pending before the House of Representatives, which would permit the courts to once again manage their business in response to daily needs.[53] That bill would abolish all statutory provisions granting a priority basis for the hearing of any class or category of civil case (other than habeas corpus) in both the courts of appeals and district courts.

The basic issue, of course, is "access to justice". Those who are involved in a particular field of law naturally and understandably have a propensity to regard it as more important than other areas of legal practice. Practitioners have a duty to utilize all permissible "advantages" when serving their clients; they may even perceive a responsibility to obtain, if at all possible, new "advantages". In his letters to both Judiciary Committees of July 18 and 19,[54] Bankruptcy Judge Gandy stated that:

> It is, therefore, not surprising that *every lawyer organization known to me that represents attorneys who practice before the bankruptcy court... UNANIMOUSLY have taken, or apparently will take the position that Article III status must be given to the bankruptcy courts.* (emphasis in original)

It is certainly not surprising; what specialized group of practitioners would not want to have a *specialized/generalized* forum for the resolution of all of their litigation work? If they can convince Congress that that specialized forum with full general jurisdiction is necessary and in the public's best interest, they are simply -- and quite properly -- performing their specialized advocacy function successfully.

In early 1975, Congress passed the Speedy Trial Act[55] because it concluded that "...the right to a speedy trial belongs not only to the defendant, but to society as well."[56] In criminal cases personal liberty, not property, is at issue, and society is well served when guilt or innocence is determined quickly --

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[53] See unpublished Hearings on H.R. 4396 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 97th Cong., 2d Sess. (June 22, 1982).

[54] See page 19, *supra*.

[55] Act of Jan. 3, 1975, Pub. L. No. 93-619, Title I, §101, 88 Stat. 2076.

[56] H. Rep. No. 93-1508, 93d Cong., 2d Sess. 7 (1974).

not after months or years of delay. In the civil law area, the rapid resolution of certain types of cases may be of great value to society. Congress, now in the process of abolishing civil priorities, may control that decision almost exclusively if it chooses to take control.

The Judicial Conference believes that an entire new nationwide system of general jurisdiction trial courts fully parallel to the district courts is not necessary to remedy the defect which *Northern Pipeline* has identified in the 1978 Bankruptcy Reform Act, will require extensive reallocation of existing judicial system resources, and will result in unjustifiable increases in appropriated funds. It must leave the evaluation of related public policy factors to the Congress.

ADDITIONAL FUNDS BUDGETED AND EXPENDED AS A RESULT OF THE BANKRUPTCY REFORM ACT
(Dollar Amounts in Thousands)

	Amounts Requested by the Judiciary	Amounts Approved by the Congress	Actual Expended F.Y. 1980	Approved by the Congress and Expended by the Judiciary: F.Y. 1981 Approved	F.Y. 1981 Actual Expended	F.Y. 1982 Approved	F.Y. 1982 Estimate Expended	Estimated Amounts Available F.Y. 1983	Estimated Amounts Available F.Y. 1984
Fiscal Year 1980									
Contract Court Reporters	$ 6,437	$ 3,200	$ 1,600	$ 2,683[1]	$ 2,500	$ 3,000	$ 2,900	$ 3,240	$ 3,499
215 Law Clerks	6,087	6,087	4,000	6,280	5,700	6,812	6,800	7,118	7,400
92 Midlevel Management Personnel	2,881	2,881	2,000	2,993	2,700	3,262	3,160	3,419	3,555
Reclassification of Secretaries and Clerks	2,995	2,995	2,995	3,039	3,039	3,085	3,085	3,130	3,175
Upgrading Libraries for Existing Judges	5,913	3,723	1,480	930[2]	610	1,042	910	1,125	1,213
Travel to Circuit Conference	38	38	38	42	38	58	38	63	68
Space - Judges/Staff and Midlevel	4,936	4,200	900	4,400	2,015	4,700	3,100	5,615	5,950
Furniture and Furnishings	3,945	1,948	1,088	.....	1,863	.....	600	.....	.....
20 Additional Bankruptcy Judges/Staff	3,869	.....	.....	.....	.....	.....	.....	.....	.....
Administrative Office 13 requested - 6 approved	307	160	70	170	100	185	185	194	200
Jury Trial	.....	.....	.....	.....	20	.....	60	.....	.....
Subtotal	37,408	25,232	14,171	20,537	18,585	22,144	20,838	23,904	25,062
Fiscal Year 1981									
Merit Screening Travel	50	50	.....	50	25	69	69	75	80
Estate Administrators (Salaries & Expenses) 125 requested - 74 approved	3,960	1,455	.....	1,455	600	1,530	1,530	1,600	1,660
Estate Administrators (Space)	233	140	.....	140	40	150	123	180	190
Estate Administrators (Furniture)	250	150	.....	150	90	.....	42	.....	.....
Administrative Office 2 requested - none approved	39	.....	.....	.....	.....	.....	.....	.....	.....
Subtotal	4,532	1,795	.....	1,795	755	1,749	1,764	1,855	1,930
Fiscal Year 1982									
Estate Administrator Annualization of 74 approved 1981	1,027	1,027	.....	.....	.....	1,027	900	1,076	1,120
51 Additional Estate Administrators	1,767	1,616	.....	.....	.....	1,616	600	1,641	1,710
51 Estate Administrators (Space)	101	101	.....	.....	.....	101	30	120	127
51 Estate Administrators (Furniture)	113	113	.....	.....	.....	113	35	.....	.....
Subtotal	3,008	2,857	.....	.....	.....	2,857	1,565	2,837	2,957
Fiscal Year 1983									
39 Estate Administrators (Amendment)	1,400	.....	.....	.....	.....	.....	.....	.....	.....
39 Estate Administrators (Space)	529	.....	.....	.....	.....	.....	.....	.....	.....
39 Estate Administrators (Furniture)	594	.....	.....	.....	.....	.....	.....	.....	.....
Subtotal	2,523	.....	.....	.....	.....	.....	.....	.....	.....
GRAND TOTAL	$47,471	$29,884	$14,171	$22,332	$19,340	$26,750	$24,167	$28,596	$29,949
Amounts by Appropriation									
Fees of Jurors	$	$	$	$	$ 20	$	$ 60	$	$ .....
Bankruptcy Courts, Salaries and Expenses	36,424	23,072	12,113	17,472	15,212	21,501	20,057	22,487	23,482
Space and Facilities	10,701	6,652	1,988	4,690	4,008	5,064	3,863	5,915	6,267
Administrative Office	346	160	70	170	100	185	185	194	200

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[1] Excludes $517,000 which was reprogrammed for salaries of court reporters and is currently being used to fund temporary employment. These amounts remain available for full-time permanent court reporters with the Conference approval.

[2] Excludes $2,800,000 for one-time purchases of lawbooks in fiscal year 1980.

APPENDIX B

IMPACT OF BANKRUPTCY REQUIREMENTS ON TOTAL JUDICIARY BUDGET, 1977-1982
($000)

Fiscal Year	Total Judiciary[1]	Percent Increase Over Previous Year	Bankruptcy Appropriations	Percent Increase Over Previous Year	Amount of Increase Over Previous Year		Bankruptcy Increase as a Percent of Judiciary Increase
					Total Judiciary[1]	Bankruptcy	
1977	$326,000		$31,000				
1978	367,000	12.58	34,000	9.68	$41,000	$ 3,000	7.32
1979	413,000	12.53	36,000	5.88	46,000	2,000	4.35
1980	504,000	22.03	56,000	55.55	91,000	20,000	21.98
1981	539,000	6.94	69,000	23.21	35,000	13,000	37.14
1982	606,000	12.43	85,000	23.19	67,000	16,000	23.88

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[1] Excludes Space and Facilities appropriation for comparative purposes.

Prepared in: FMD-AO
Date: August 26, 1982

APPENDIX C

BUDGET AUTHORITY FOR ALL AGENCIES, LEGISLATIVE BRANCH AND JUDICIAL BRANCH
(Millions of Dollars)

Fiscal Year	GNP	Growth	Federal Budget	Growth	Federal Budget Ex. DOD	Growth	Legislative Branch*	Growth	Judiciary Budget**	Growth	Judiciary as a Percent of GNP	Federal Budget	Federal Budget Ex. D
	Amount	Percent	Amount	Percent	Amount	Percent	Amount	Percent	Amount	Percent	Percent	Percent	Percent
1940	$ 100,000		$ 11,559		$ 9,689		$ 25		$ 11		.011	.095	.114
1945	212,300	112	68,390	492	10,771	11	50	100	14	27	.007	.020	.130
1950	286,200	35	50,222	-27	35,925	234	81	62	24	71	.008	.048	.067
1955	399,300	40	57,076	14	26,289	-27	106	31	32	33	.008	056	.122
1960	506,000	27	75,270	32	33,311	27	117	10	50	56	.010	.066	.150
1965	688,100	36	138,610	84	85,410	156	171	46	76	52	.011	.055	.089
1970	982,400	43	212,973	54	136,284	60	359	110	126	66	.013	.059	.092
1975	1,528,800	56	412,099	93	326,099	139	754	110	250	98	.016	.061	.077
1980 (est.)	2,516,100	65	653,974	59	515,339	58	1,277	69	544	118	.022	.083	.106

*Excludes Legislative Branch funds for rental of space of $13,000,000 in 1975 and $17,000,000 in fiscal year 1980 to make the data consistent with prior years.

**Excludes funds for rental of space of $62,500,000 in fiscal year 1975 and $80,000,000 in fiscal year 1980 to make the data consistent with prior years.

APPENDIX D

EXHIBIT ACCOMPANYING LETTER OUTLINING TESTIMONY OF DEAN M. GANDY BEFORE SENATE JUDICIARY COMMITTEE, JULY 22, 1982

TYPE OF HEARINGS SCHEDULED MAY-JUNE, 1982 WITH ARTICLE III ISSUES

TYPE OF CASE	HEARINGS Art. III Judge Possibly Required	 Art. III Judge Not Required
Complaints to lift stay	51	
Discharge Day		
Discharges (No disputes, 64)		
Lien avoidances	12	
Reaffirmations	16	
Chapter 13 Confirmation Day		
Confirmations (No disputes, 38)		
Lien avoidances	15	
Motions to dismiss		2
Objections to discharge and exceptions to dischargeability	17	
Motions regarding: Remand and removal, to abstain, transfer, dismiss appeals, for injunctive relief, and to modify injunction	16	
Motions for summary judgment, applications to approve compromise, and motions to dismiss	14	
Objections to claims (involving 59 individual claims)	14	
Complaints for turnover of assets, objections to claimed exemptions	12	
Chapter 11 disclosure statement and confirmation hearings (§1129 issues present)		8 (?)
Attorney's fees, expense of litigation		7
Fraudulent transfers and preference actions	6	
als regarding validity of liens and status of secured claims	4	
Complaints to sell property free of liens		3
Applications to reject/assume executory contracts or leases	2	
Involuntary petitions		2
Collection of accounts receivable, suits on notes	2	
Motions to convert to Chapter 7		1
-day trial regarding breach of contract, etc.	1	
-day jury trial re alter ego	1	
Other (miscellaneous conferences, distribution of settlement proceeds, applications of trustee for appointment of counsel ...)		6
TOTAL, excluding Discharges and Chapter 13 Confirmations	183	29
	86%	14%

Trials And Matters Determined By Bankruptcy Judges Where No State Law Issue To Be Decided

Complaint to lift stay (11 U.S.C. 362)

Section 362(a) automatically stays creditors from actions against a debtor who files a petition under the bankruptcy code. The most frequent adversary proceedings filed in bankruptcy cases are complaints for relief from the automatic stay (11 U.S.C. 362(d)) which may be granted for cause after notice and hearing. The most frequent basis for granting relief is that the creditor is not adequately protected (Section 361). Other causes are that the debtor has no interest in the property or that the property is not necessary to the reorganization. While a contract may be the basis of the creditor's claim, the bankruptcy judge will be deciding whether there is adequate protection under Section 361 or whether the debtor has an interest in specific property or whether the property is necessary to a reorganization. These determinations are not on the merits of the contract.

It is noted that the Rules Committee is relegating this adversary proceeding to the status of a motion.

Lien Avoidance

Section 522 deals with exemptions allowed individual debtors. States may reject the exemptions provided by the section and require the application of state enacted exemptions. (Thirty-two states covering 55 districts have adopted this option.) Subsection (f) permits a debtor to avoid the fixing of certain liens to the extent that it impairs an exemption (authorized by the section or by state law) to which a debtor is entitled. The decisional process of the judge is not interpreting the state law creating the lien right, but whether it impairs an exemption.

Reaffirmations (11 U.S.C. 524(c) and (d)

Agreements to reaffirm debts between the debtor and the holder of a claim are enforceable after compliance with the criteria established by the sections. These sections require the court to inform the debtor that agreement is not required, the legal consequences of reaffirmation of a debt and the consequences of default. The sections also require an evaluation by the court that the debt seeking to be reaffirmed is a consumer debt not secured by real estate and that reaffirmation will not impose undue hardship, that it is in the debtor's best interest and that it is entered into in good faith. There is no responsibility of the court to consider the original contract or tort which created the debt or the state laws related to such original contract or tort.

Objections to Discharge - Dischargeability

Various sections of the code (e.g. 523, 524, 727, 1141, 1327) define the circumstances under which discharges will be given or withheld from a debtor, the effects of the discharge and property which is excepted from discharges. The right to a discharge is conferred on debtors by Title 11 as a public right created by Congress along with the right conferred on creditors to equitable distribution of assets. Any interpretation of state conferred rights, e.g. interpretation of state court's divorce decree that an award is or is not alimony and therefore is or is not within the exception of Section 523(a)(5) to the discharge that is necessary to augment the public rights conferred by Congress properly is within the authority of the bankruptcy judge to decide.

Objections to Exemptions (11 U.S.C. 522)

Section 522 provides that certain property enumerated in the section may be exempted from the debtor's estate. These, too, are public rights (i.e. for individual debtor to keep certain property) created by Congress and any interpretation of an applicable state or federal exemption statute that a particular asset does or does not come within the meaning of the exemption provision is to augment this public right. It is noted that most objections to claimed exemptions are filed by the trustee in a case who is an officer of the court appointed to collect the assets and administer the estate.

Objections to Claims (11 U.S.C. 501)

Creditors may file proof of their claims in a case which are deemed allowed unless objected to by a party in interest. Most such objections are filed by the trustee. When an objection is filed, the court determines the amount allowed consistent with the criteria in 502(b)(1) to (10). To the extent that an objection is based on state law under 502(b)(1), the bankruptcy judge can hear the matter in furtherance of the public right conferred by Congress.

APPENDIX E

Summary of Bankruptcy Caseload 1970 through 1982

During the period 1970 through 1982, the number of bankruptcy cases commenced rose 89 percent from 194,399 in 1970 to 367,866 in 1981. Business bankruptcies as a percent of all filings rose from 8.3 percent in 1970 to a high of 15.0 percent in 1977 and 1978 before declining to 13.2 percent in 1981 and back up to 15.3 percent in 1982. The following table and graph reflect the rapid increase in bankruptcy workload during this period.

Bankruptcy Cases Commenced
During the Twelve Month Periods Ended June 30, 1970 through 1982

Year	Total	Non-Business	Business	Business as Percent of Total
1970	194,399	178,202	16,197	8.3
1971	201,352	182,249	19,103	9.5
1972	182,869	164,737	18,132	9.9
1973	173,197	155,707	17,490	10.1
1974	189,513	168,767	20,746	10.9
1975	254,484	224,354	30,130	11.8
1976	246,549	211,348	35,201	14.3
1977	214,399	182,210	32,189	15.0
1978	202,951	172,423	30,528	15.0
1979	226,476	196,976	29,500	13.0
1980[1] cases	277,637	241,397	36,240	13.1
estates	360,957[2]	314,856	45,857	12.7
1981[1] cases	361,239	313,499	47,740	13.2
estates	519,063[3]	452,145	66,006	12.7
1982[1] cases	367,866	311,443	56,423	15.3
estates	527,811[4]	449,839	77,503	14.7

[1] Pursuant to the Bankruptcy Reform Act of 1978, (implemented October 1, 1979) husband and wife are afforded the option of filing jointly, incorporating two estates into a single case. Data for 1980 and 1981 is shown for both cases and estates. For all prior years, the number of cases is equivalent to the number of estates.

[2] Included in the total are 239 involuntary cases filed under the Bankruptcy Act and five Section 304 cases filed under the Bankruptcy Reform Act not included in the breakdown of non-business and business cases.

[3] Included in the total are 911 reopened Bankruptcy Act cases and one Section 304 case filed under the Bankruptcy Reform Act not included in the breakdown of non-business and business cases.

[4] Included in the total are 469 reopened Bankruptcy Act cases not included in the breakdown of non-business and business cases.

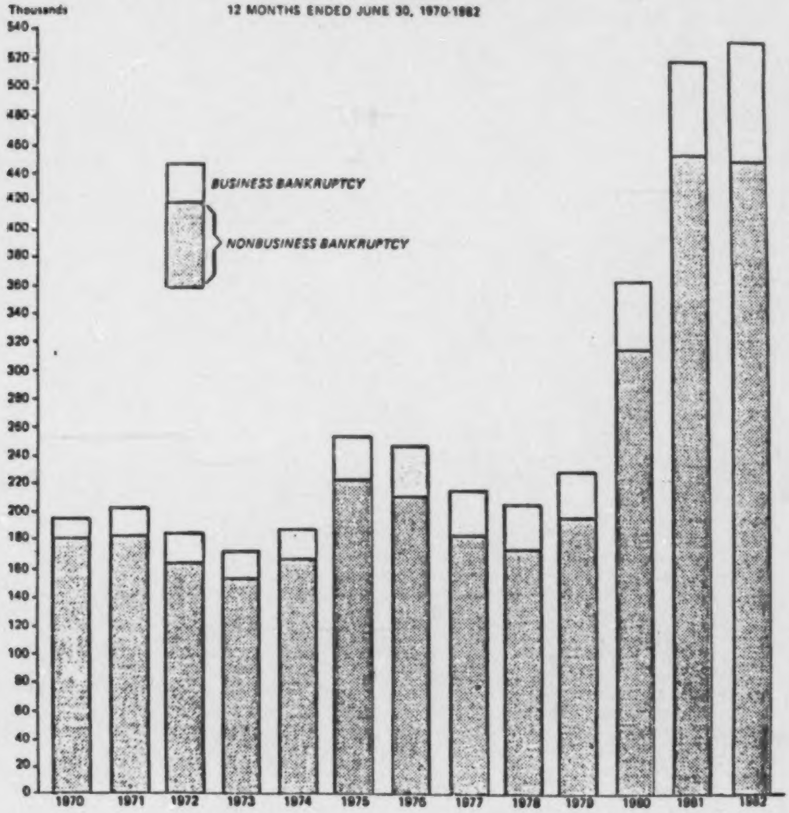
APPENDIX E
Page 2

UNITED STATES BANKRUPTCY COURTS

CHART XIV

BANKRUPTCY ESTATES COMMENCED

BUSINESS AND NONBUSINESS
12 MONTHS ENDED JUNE 30, 1970-1982



APPENDIX F

memorandum

DATE: July 22, 1982
CHI
REPLY TO [illegible] OF: Carl H. Imlay, General Counsel

SUBJECT: Continuation of Old Courts of Bankruptcy During Transition Period

TO: William E. Foley, Dirctor

It is my conclusion that the courts of bankruptcy established under the Bankruptcy Act of 1898, as amended, continue to exist until April 1, 1984, despite the formal repeal of the old Bankruptcy Act by the Bankruptcy Act of 1978, Pub. L. 95-598, § 401(a), 92 Stat. 2682 (November 6, 1978). The 1978 Act expressly provides for continuation of the old courts of bankruptcy and their jurisdiction as departments of the respective district courts:

> The courts of bankruptcy, as defined under section 1(10) of the Bankruptcy Act [of 1898], created under section 2a of the Bankruptcy Act, and existing on September 30, 1979, shall continue through March 31, 1984, to be the courts of bankruptcy for the purposes of this Act and the amendments made by this Act. Each of the courts of bankruptcy so continued shall constitute a separate department of the district court that is such court of bankruptcy under the Bankruptcy Act.

Act of November 6, 1978, Pub. L. 95-598, § 404(a), 92 Stat. 2683. This provision incorporates and preserves through March 31, 1984, the following sections of the old Bankruptcy Act:

> Section 1(10): "Courts of bankruptcy" shall include the United States district courts and the district courts of the Territories and possessions to which this Act is or may hereafter be applicable[.]
>
> Section 2: Creation of courts of bankruptcy and their jurisdiction.--a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to--[Paragraphs 1 through 22 list specific powers of the courts of bankruptcy.]

Act of July 1, 1898, c. 541 § 2a, 30 Stat. 545, as amended (11 U.S.C. § 11(a) (1976)).

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114
[illegible]

Other provisions of the 1978 Act support this conclusion. During the transition period, October 1, 1979 through March 31, 1984, title IV of the 1978 Act gives the courts of bankruptcy and the bankruptcy judges expanded jurisdiction and administrative authority that are essentially the same as those given to the United States bankruptcy courts starting on April 1, 1984. See, e.g., Pub. L. 95-598, §§ 404(e), 405(a)(1), 405(b). However, the legislative history indicates that the original court structure is meant to be preserved:

> The purpose of section 404 is to continue the present bankruptcy court system during the transition period, with changes that are necessary to make the transition system enough like the proposed new court system so that the measurement process of case-load and judicial time requirements will be accurate.

H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 459 (September 8, 1977). These changes include granting the bankruptcy judges the authority to appoint officers and employees of the courts of bankruptcy parallel to those of the district courts. Pub. L. 95-598, § 404(e), 92 Stat. 2684.

The characterization of the transitional courts of bankruptcy as "separate departments" of the district courts should be interpreted only as placing the bankruptcy judges at the head of the transitional courts, not as creating an adjunct court or Article I court prior to April 1, 1984. This conclusion is evidenced by the retention of some district court authority over the office of bankruptcy judge from the old Bankruptcy Act, notably provisions relating to appointment, removal, compensation, vacancies, absence, and disability. Pub. L. 95-598, § 404(d), 92 Stat. 2684.

The Bankruptcy Act of 1978 further provides during the transition period:

> Except as provided in subsection (c) of this section [appeals to panels, district court, and court of appeals], any proceeding in a court of bankruptcy in a case under title 11 of the United States Code that is not before the United States bankruptcy judge [formerly referee] shall be before the judge of the court of bankruptcy [i.e., United States district judge] for the district in which such case is pending.

Pub. L. 95-598, § 405(a)(2), 92 Stat. 2685. This paragraph provides a basis for routing to an Article III judge any proceeding which the bankruptcy judge lacks authority to conduct by virtue of the Supreme Court's ruling in the

Marathon case. In fact, if applied in this situation, it would appear to be mandatory, though the district court may abstain from hearing such a proceeding as provided in 28 U.S.C. § 1471(d). Pub. L. 95-598, §§ 241, 404(b), 92 Stat. 2669, 2683.

Since the courts of bankruptcy as they existed on September 30, 1979, and the bankruptcy judges (formerly referees in bankruptcy) are continued through March 31, 1984, by virtue of section 404 of the 1978 Act, the Marathon case rule would have the following consequences on October 4, 1982, in the absence of remedial legislation:

1. The courts of bankruptcy would effectively revert to their jurisdictional status under section 2a of the old Bankruptcy Act, 11 U.S.C. 11(a) (1976). The Marathon plurality opinion and concurring opinion have the effect of invalidating the expanded jurisdiction granted under section 405(b) of the Bankruptcy Act of 1978, which gives the transitional courts of bankruptcy the same jurisdiction granted to the permanent United States bankruptcy courts under section 241 of the 1978 Act.

2. The courts of bankruptcy as they existed on September 30, 1979, and their jurisdiction under the old Bankruptcy Act would be continued through March 31, 1984 by virtue of section 404(a) of the 1978 Act, at which time additional legislation will be required.

cc: Bill Weller

APPENDIX G

Table 1
ADDED COST OF ESTABLISHING AN ARTICLE III BANKRUPTCY JUDGESHIP AS CONTEMPLATED BY H.R. 6978

	July 20 Estimate	H.R. 6978	
Appropriation: Salaries and Expenses, Bankruptcy Courts		Total	Added
Salary of the Bankruptcy Judge	$ 58,500	$ 65,000	$ +6,500
Agency contribution for retirement, life insurance, and health benefits	5,000	3,575	-1,425
TOTAL	63,500	68,575	5,075
Bankruptcy Judges Staff			
Salaries: Law Clerk, Grade JSP-12	28,245		
Secretary, Grade JSP-10	21,449		
Agency contribution for retirement, life insurance, and health benefits	4,806		
TOTAL	54,500		
Miscellaneous Expenses			
Travel, Bankruptcy Judge and staff	5,000		
Library: Initial cost	30,000 NR		
Annual cost (second and succeeding years)	(5,000)		
Word processing equipment purchase	10,000 NR		
General office equipment	4,000 NR		
Miscellaneous expenses (communications, supplies, etc.)	5,000		
TOTAL (initial cost)	54,000		
TOTAL (annual recurring cost)	15,000		
Appropriation: Space and Facilities, The Judiciary			
Rental of space	43,000	62,500	+19,500
Tenant alterations and other reimbursable services	8,000	12,000	+4,000
Furniture and furnishings	45,000 NR	61,500 NR	+16,500 NR
Replacement and rehabilitation of furniture and furnishings (recurring)	(5,000)	(7,000)	(+2,000)
TOTAL (initial cost)	96,000	136,000	40,000
TOTAL (annual recurring cost)	56,000	81,500	25,500
GRAND TOTALS:			
Initial (first year) cost	$268,000	313,075	+45,075
Annual recurring cost	$189,000	$219,575	$+30,575

NR Nonrecurring expense

Table 2

UNIT COST FACTORS USED IN PROJECTING COST IMPACT OF H.R. 6978

Unit Cost of Staff Comparable to Article III Judges

Second Law Clerk

Appropriation: Salaries and Expenses, Bankruptcy Courts

Law Clerk, Grade JSP-12	$ 28,245	
Agency contribution for retirement, life insurance, and health benefits..	2,120	
Travel	1,000	
Miscellaneous expenses (communications, supplies, etc.)	2,500	
General office equipment	2,000	NR
TOTAL (initial cost)	$ 35,865	
TOTAL (annual recurring cost)	$ 33,865	

Appropriation: Space and Facilities, the Judiciary

Rental of space	2,500	
Furniture and furnishings	2,500	(NR)
Replacement and rehabilitation of furniture (recurring)	(250)	
TOTAL (initial cost)	$ 5,000	
TOTAL (annual recurring cost)	$ 2,750	
GRAND TOTAL (Second Law Clerk)		
Initial (first year) cost	$ 40,865	
Annual recurring cost	$ 36,615	

Court Reporter

Appropriation: Salaries and Expenses, Bankruptcy Courts

Court Reporter, Ungraded	32,892	
Agency contribution for retirement, life insurance, and health benefits..	3,300	
TOTAL (initial cost)	$ 36,192	

Appropriation: Space and Facilities, the Judiciary

Rental of space	2,500	
Furniture and furnishings	2,500	(NR)
Replacement and rehabilitation of furniture (recurring)	(250)	
TOTAL (initial cost)	$ 5,000	
TOTAL (annual recurring cost)	$ 2,750	
GRAND TOTAL (Court Reporter)		
Initial (first year) cost (less $13,200 contract court reporter)	$ 27,992	
Annual recurring cost (less $13,200 contract court reporter)	$ 25,742	

Chief Judge Staff

Assume a law clerk initial cost	$ 41,000
Law clerk annual recurring cost	36,600

Table 2
UNIT COST FACTORS USED IN PROJECTING COST IMPACT OF H.R. 6978

(Continued)

Unit Cost of Senior Judges

Senior Judges

Appropriation: Salaries and Expenses, Bankruptcy Courts		
Judges salaries	65,000	
Agency contribution for retirement, life insurance, and health benefits	3,600	
Law Clerk, Grade JSP-12	28,245	
Secretary, Grade JSP-10	21,449	
Agency contribution for retirement, life insurance, and health benefits	4,806	
Travel	12,000	
Miscellaneous expenses (communications, supplies, etc.)	7,500	
Word processors	10,000	NR
General office equipment	5,000	NR
TOTAL (initial cost)	$157,600	
TOTAL (annual recurring cost)	$142,600	
Appropriation: Space and Facilities, the Judiciary		
Rental of space	47,000	
Furniture and furnishings	49,000	(NR)
Tenant alterations	12,000	
TOTAL (initial cost)	$108,000	
TOTAL (annual recurring cost)	$ 59,000	
GRAND TOTAL (Senior Judges)		
Initial (first year) cost	$266,000	
Annual recurring cost	$202,000	

NR Nonrecurring expense

APPENDIX G
Page 4

Table 3
PROJECTED COST IMPACT OF H.R. 6978 - BANKRUPTCY COURT ACT OF 1982

Added Cost of Establishing 227 Bankruptcy Judgeships as Contemplated by H.R. 6978	First Year	Annual Recurring
Salary Increase - 227 @ $6,500 ($65,000 - $58,500)	$ 1,475,000	$ 1,475,000
Decrease in cost of Agency Contributions, Retirement, Life Insurance, and Health Benefits - 227 at $-1,425	-324,000	-324,000
Additional Space for Bankruptcy Judge - 227 @ $19,500	4,427,000	4,427,000
Additional Furniture for Bankruptcy Judges - 227 @ $16,500	3,746,000	454,000
Increase in Tenant Alterations - 227 @ $4,000	908,000	908,000
Subtotal	10,232,000	6,940,000
Cost of Staff Comparability to Article III Judges		
Second Law Clerk - 227 @ $41,000 first year and $36,600 recurring	9,307,000	8,308,000
Court Reporters - 227 @ $28,000 first year and $25,700 recurring	6,356,000	5,834,000
Cost of Judgeship - 5 @ $313,000 first year and $220,000 recurring	1,565,000	1,100,000
Chief Judges with 5 or more Judges receive 1 Additional Staff Employee - 8 @ $41,000 first year and $36,600 recurring	328,000	293,000
Subtotal	17,556,000	15,535,000
Cost of Providing Senior Status for Bankruptcy Judges Comparable to Article III Judges		
Senior Judges - on April 1, 1983, 40 Judges will be eligible for senior status assuming 20 of these are reappointed and shortly afterwards (5 years or less) elected senior status - 20 @ $266,000 first year and $202,000 recurring	5,320,000	4,040,000
TOTAL	$33,108,000	$26,515,000

Cost of Additional Judges Required to Fully Implement the Bankruptcy Reform Act of 1978		
73 Judges (300 - 227) @ $114,000 first year and $93,000 annual recurring	$ 8,322,000	$ 6,789,000

Unit Cost for Additional Judges

Additional Requirements Per Judge	First Year	Annual Recurring
Judge	$ 45,000	$31,000
Court Reporter	28,000	25,700
Law Clerks	41,000	36,600
	$114,000	$93,300

TOTAL	$41,430,000	$33,304,000

A.O. Budget Branch
September 7, 1982

APPENDIX H

97th CONGRESS
2d Session

[H.R. ____]

[S. ____]

[IN THE HOUSE OF REPRESENTATIVES]

[IN THE SENATE OF THE UNITED STATES]

__________, 1982

Mr. ____________________ introduced the following bill which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend certain provisions of title 28 of the United States Code related to jurisdiction in bankruptcy proceedings, and for other purposes.

Be *it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 241 of the Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2668) is amended by making the following amendments to title 28 of the United States Code:

(a) Section 1471 is amended to read as follows:

"§1471. Jurisdiction

"(a) The district courts shall have original and exclusive jurisdiction of all cases under title 11, including any subsidiary proceeding.

"(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction over all related proceedings at law or in equity involving property claimed by the representative of any estate under title 11.

"(c) The bankruptcy court for the district in which a case under title 11 is commenced or pending shall exercise all of the jurisdiction conferred on the district courts by subsection (a) of this section, *Provided*, however, that a district judge may recall such a case on his own motion or the motion of a party or the bankruptcy judge. A case so recalled, or a proceeding under subsection (b) of this section, shall be determined by a district judge, and may be referred to a United States magistrate in accordance with the provisions of section 636 of this title, as applicable to civil actions generally.

"(d) A district court, in the interest of justice, may abstain from hearing any proceeding. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.

"(e) The bankruptcy court in which a case under title 11 is commenced or pending may exercise jurisdiction over all property, wherever located, of the debtor or the estate as of the commencement of such case.

"(f) Any bankruptcy judge may be designated to serve as a special master for the district courts pursuant to the Federal Rules of Civil Procedure.

"(g) As used in this section --

"(1) "case under title 11" means a case commenced under title 11 of this code;

"(2) "subsidiary proceeding" means a proceeding which is based on a claim under a provision of title 11, and which could not have been brought by any person in the absence of the commencement of a case under title 11; and

"(3) "related proceeding" means a proceeding based on a claim under a statute of the United States other than title 11, which is necessary to the determination of a claim described by paragraph (2) of this subsection.".

(b)(1) Section 1473 is amended to read as follows:

"§1473. Venue of proceedings under title 11 and certain other proceedings

"(a) Except as provided in subsection (b) of this section, a proceeding under title 11 may be commenced in the bankruptcy court in which the case under title 11 pertaining to the same debtor or estate is pending.

"(b) A representative of an estate under title 11 may commence a proceeding under title 11 to recover a money judgment of, or property worth, less than $1,000 or a consumer debt of less than $5,000 only in the bankruptcy court for the district in which a defendant resides.

"(c) A proceeding at law or in equity, other than a case or proceeding under title 11, involving property claimed by the representative of an estate under title 11 may be commenced as otherwise provided by law.".

(2) The reference to section 1473 in the table of sections of chapter 90 of title 28 of the United States Code is amended to read as follows:

"§1473. Venue of proceedings under title 11 and certain other proceedings.".

(c) Section 1475 is amended by striking "under title 11 or a proceeding arising under or related to such a case" and inserting in lieu thereof "or proceeding under title 11".

(d) Sections 1476, 1478, and 1479, and the references thereto in the table of sections of chapter 90 of title 28 of the United States Code, are repealed.

(e) Section 1480(a) is amended by striking the comma after the word "jury" and all following, and inserting in lieu thereof ".".

(f) Section 1481 is amended by inserting "in a case or proceeding under title 11" following the word "admiralty".

SEC. 2. If any part of the Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2549) or any amendment thereto is held invalid, the remainder of that Act and any amendments thereto shall not be affected thereby. If any provision of any part of that Act or any amendment thereto, or the application thereof to any person or circumstances, is held invalid, the provisions of other parts and of any amendments thereto and their application to other persons or circumstances shall not be affected thereby.

SECTION-BY-SECTION ANALYSIS

Section 1 of the draft bill amends several sections in Title 28 of the United States Code, as created by section 241(a) of P. L. 95-598, which are related to jurisdiction in bankruptcy matters. The amendments -- only eight Title 28 provisions need be affected -- address the thrust of the Supreme Court's June 28, 1982 decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.* (No. 81-150).

(a) §1471 ("Jurisdiction") is amended to clarify the jurisdiction of the district and bankruptcy courts in bankruptcy cases and proceedings.

Subsection (a) gives the district courts original and exclusive jurisdiction of all cases under Title 11, including any subsidiary proceeding.

Subsection (b) gives the district courts original but not exclusive jurisdiction over all related proceedings at law or in equity involving property claimed by the representative of any estate under Title 11, notwithstanding any Act of Congress conferring exclusive jurisdiction over such matters upon courts other than the district courts.

Subsection (c) gives the bankruptcy court for the district in which a case under Title 11 is commenced or pending the right to exercise all of the jurisdiction conferred on the district courts by subsection (a), except that a district court may recall any such case on its own motion or on the motion of a party or the bankruptcy judge. A case so recalled, or a related proceeding, will be determined by a district judge, and may be referred to a United States magistrate in accordance with 28 U.S.C. 636.

Subsection (d) permits a district court, in the interest of justice, to abstain from hearing any proceeding. Such an abstention, or decision not to abstain, is unreviewable.

Subsection (e) permits a bankruptcy court in which a case under Title 11 is commenced or pending, to exercise jurisdiction of all property, wherever located, of the debtor or the estate as of the commencement of the case.

Subsection (f) permits a bankruptcy judge to be designated to serve as a special master pursuant to the Federal Rules of Civil Procedure.

Subsection (g) defines "case un[illegible] Title 11" as a case commenced under Title 11 of the United States Code; [illegible]idiary proceeding" as a proceeding based on a claim under a Title 11 pr[illegible]ion, and which could not have been brought by any person in the absence [illegible] the commencement of a case under Title 11; and "related proceeding" as [illegible] roceeding based on a claim under a statute of the United States other than Title 11, which is necessary to the determination of a claim in a "subsidiary proceeding".

(b) §1473 ("Venue of proceedings under Title 11 and certain other proceedings") establishes venue in proceedings under Title 11.

Subsection (a) establishes the general rule that, except as provided in subsection (b), venue of a proceeding under Title 11 lies in the bankruptcy court in which the case under Title 11 pertaining to the same debtor or estate is pending.

Subsection (b) permits the representative of an estate under Title 11 to commence a proceeding under Title 11 to recover a money judgment of, or property worth, less than $1,000 or a consumer debt of less than $5,000, only in the bankruptcy court for the district in which a defendant resides.

Subsection (c) permits a proceeding at law or in equity, other than a case or proceeding under Title 11, involving property claimed by the representative of an estate under Title 11, to be commenced as otherwise provided by law.

(c) §1475 ("Change of venue") is amended to permit a bankruptcy court to transfer a case or proceeding under Title 11 to a bankruptcy court for another district, in the interest of justice and for the convenience of the parties.

(d) §1476 ("Creation or alteration of district or division"), §1478 ("Removal to the bankruptcy courts"), and §1479 ("Provisional remedies; security") are repealed as unnecessary.

(e) §1480 ("Jury trials") is amended to clarify that, except with respect to issues under section 303 of Title 11 ("Involuntary cases"), any right to a trial by jury is preserved.

(f) §1481 ("Powers of bankruptcy") is amended to reflect that, except for certain limited exceptions, a bankruptcy court has the powers of a court of equity, law, and admiralty in a case or proceeding under Title 11.

Section 2 of the draft bill is a severability clause.

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